SUPREME COURT OF THE UNITED STATES.

No. 148.

THF BOARD OF PRESIDENT AND DIRECTORS OF THE SAINT LOUIS PUBLIC SCHOOLS, PLAINTIFFS IN ERROR,

vs.

MARY FRITZ, FORMERLY MARY SCHOENTHALER AND GEORGE BAYHA, ADMINISTRATOR OF G. SCHOENTHALER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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a The United States of America to Mary Fritz, Charles Fritz, and George Bayha, administrator of Gottfried Schoenthaler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Missouri, wherein the Board of President and Directors of the St. Louis Public Schools are plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David Wagner, Chief Justice of the Supreme Court of Missouri, this 24th day of April, in the year of our Lord one thousand eight hundred and sixty-seven.

DAVID WAGNER,
Presiding Judge Sup. Ct. Mo.
JAMES TAUSSIG,
Att'y for Plaintiffs in Error.

UNITED STATES OF AMERICA, *Eastern District of Missouri, ss:*

Executed the within writ by reading the same to the within-named Charles Fritz, George Bayha, and Mary Fritz, at Saint Louis, Mo., in said district on the 6 day of June, A. D. 1867.

J. B. ROGERS,
U. S. Marshal Eastern District of Mo.

Marshal's fees: 3 services, $6 00.

1 STATE OF MISSOURI, *ss:*

Be it remembered, that on the first day of October, one thousand eight hundred and sixty-four, there was filed in the office of the clerk of the Supreme Court, held at St. Louis, of the State of Missouri, a transcript of the record and proceedings in a certain cause lately pending in the Circuit Court of St. Louis county, in the State aforesaid.

Which transcript is in the words and figures following, to wit:

STATE OF MISSOURI, *County of Saint Louis, ss:*

Be it remembered, that on the 11th day of January, A. D. eighteen hundred and sixty-one, there was filed in the office of the Clerk of the St. Louis Land Court, and now on file in the office of the clerk of the St. Circuit Court, by change of venue from said Land Court, a petition, which is in the words and figures following, to wit:

In the Saint Louis Land Court.—March term, 1861.

Petition.

THE BOARD OF PRESIDENT AND DIRECTORS of the Saint Louis Public Schools, plaintiffs,
against
GOTTFRIED SCHOENTHALER, defendant.

2 STATE OF MISSOURI, *County of Saint Louis, ss:*

The plaintiffs state, that on the first day of January, 1861, they were, and still are, entitled to the immediate possession of the following premises in United States survey, No. 400, (of the series of Saint Louis lands,) in block No. 856, in the city of Saint Louis, and in the county of Saint Louis, and in the State of Missouri, to wit: A piece or parcel of land fronting sixty feet on the west side of Front street, (commonly called the wharf,) and running back westward of that width three hundred and fifty feet and eight inches to Main street, and bounded on the east by said Front street, which is also the eastern boundary line of said survey; on the north by a line parallel with, and one hundred and ten feet and six inches north of Hazel street, on the west of Main street, which is also the western boundary line of said survey and on the south by a line parallel with, and fifty feet and six inches north of Hazel street and being so entitled to the possession thereof; that the said defendants, afterwards on the second day of January, A. D. 1861, entered into said premises, and is now, at the time of the commencement of this suit, in the possession of said premises, and unlawfully withhold from said plaintiffs the possession thereof, to their damage two hundred and fifty dollars.

The plaintiffs are a body corporate and politic, established
3 by the laws of this State.

The plaintiffs therefore ask for judgment in their favor against the defendant for the possession of said premises, for said damages, for the monthly value thereof, and for costs of rent. And the plaintiffs also ask for such other further and general relief in the premises as they may be lawfully entitled to.

E. CASSELBERRY,
Attorney for the Plaintiffs.

STATE OF MISSOURI, *County of Saint Louis*:

President of the foregoing named board of directors makes oath, and says the above petition and the matters therein as stated he believes to be true.

EDWARD WYMAN, *President.*

Subscribed and sworn to before me this 10th day of January, 1861.
EDWARD N. TRACY, *Clk.*

On the filing of which petition the following summons was issued:

Summons.

COUNTY OF SAINT LOUIS, *ss*:

The State of Missouri, to the sheriff of Saint Louis county, greeting:

We command you to summon Gottfried Schoenthaler to appear before the judge of our St. Louis Land Court on the first day of the next term thereof, to be held in the city of Saint Louis, within and for the county of Saint Louis, on the second Monday of March
4 next, then and there to answer the complaint of the Board of President and Directors of the Saint Louis Public Schools, as set forth in the annexed petition, and have you then and there this writ.

Witness Edward N. Tracy, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of Saint Louis, this 11th day of January, in the year of our Lord eighteen hundred and sixty-one.

[SEAL.] EDWARD N. TRACY, *Cl'k.*

There is endorsed on said writ the following return of sheriff:

Sheriff's return.

Executed this writ in the county of Saint Louis, on the 26th day of January, 1861, by delivering a copy of the writ and petition, as furnished by the clerk to the defendant, Gottfried Schoenthaler.

JNO. H. ANDREWS, *Sheriff.*
By FR. SCHAEFER, *Dep'ty.*

And on the 27th January, 1861, nunc pro tunc, February 4th, 1861, the following notice of application for a change of venue was filed in said court.

Notice of application for change of venue.

To the above-named defendant: Take notice, that on the 31st
5 day of January, 1861, or as soon thereafter as a hearing can be had, an application in said cause will be presented to the above-named St. Louis Land Court, at the court house, in the county of Saint Louis, in the State of Missouri, for a change of venue in said cause, to some other cause of competent jurisdiction.

Saint Louis, January 28th, 1861.

E. CASSELBERRY,
Attorney for the Plaintiffs.

Endorsed on said notice is the following return:

Served this notice in the county of St. Louis, on the 29th day of January, 1861, by delivering a copy of the same as furnished to Gottfried Schoenthaler.

J. H. ANDREWS, *Sheriff.*
By FR. SCHAEFER, *Dep'ty.*

And on the 28th day of January, 1861, the following application or a change of venue was filed:

Application for change of venue.

The plaintiffs, a body corporate and politic, state that the judge of this court is prejudiced against said corporation, and that said plaintiffs have just cause to believe that they cannot have a fair trial in this court in said cause, on account of said prejudice. The plaintiffs, therefore, ask for a change of venue in said cause to some other court, where a fair trial can be had.

6 EDWARD WYMAN, *President.*

STATE OF MISSOURI, *County of Saint Louis, ss:*

Edward Wyman, the president of the foregoing-named board of directors and the agent of said board, makes oath and says the above application and the matters therein as stated he believes to be true.

EDWARD WYMAN, *President.*

Subscribed and sworn to before me this 22nd day of January, 1861.

E. N. TRACY, *Cl'k.*

There also appears with this application the following notice:

Notice of application.

To the above-named defendants: Take notice, that on the 28th day of January, 1861, or as soon thereafter as a hearing could be had, an application in said cause will be presented to the above-named Saint Louis Land Court for a change of venue in said cause to some other court of competent jurisdiction.

E. CASSELBERRY,
Attorney for the Plaintiff.

The service of the above notice is hereby excepted.
January 28th, 1861.

C. C. SIMMONS,
One of the De'f'ts' Attorneys.

7 And on the 9th of February, 1861, the following copy of record entries was filed in the Saint Louis Circuit from the Saint Louis Land Court, October term, 1860:

Copy of record entries from Land Court.—Application for a change of venue filed in this cause.

MONDAY, *January 28th,* 1861.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE Saint Louis Public Schools
vs.
GOTTFRIED SCHOENTHALER.

And afterwards, "to wit," on the twenty-ninth day of January,

A. D. 1861, there was filed in this cause a notice of application for a change of venue in the words and figures following, to wit:

(See page 4, this transcript.)

And afterwards the following further proceedings were had in this cause, to wit:

THURSDAY, *January* 31*st*, 1861.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE Saint Louis Public Schools
vs.
GOTTFRIED SCHOENTHALER.

Change of venue.

Now, at this day, the application heretofore filed in this cause for a change of venue herein is submitted to the court, service of notice thereof having been duly made on defendant, and said application containing the allegations that the judge of this court is pre-
8 judiced against the plaintiffs, and that said plaintiffs have just cause to believe that they cannot have a fair trial in this court in said cause on account of said prejudice, said petition being duly verified by affidavit, it is therefore ordered that the venue in this cause be changed according to law to the Circuit Court of Saint Louis county.

STATE OF MISSOURI, *County of Saint Louis, ss:*

I, Edward N. Tracy, clerk of the Saint Louis Land Court within and for the said county, certify the foregoing to be a true and correct copy of the record and proceedings had in the case of the Board of President and Directors of the Saint Louis Public Schools, plaintiffs, and Gottried Schoenthatler, defendant, as fully as the same remains of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office, in the city of Saint Louis, this fourth day of February, A. D. 1861.

[SEAL.] EDWARD N. TRACY, *C'lk.*

And on the 5th day of December, A. D. 1861, the following answer of defendant was filed:

Answer of def't, G. Schoenthaler:

The said defendant comes and says that the said plaintiffs
9 were not, on the first day of January, 1861, nor at the time of the commencement of this action, nor are they now, legally entitled to the possession of the premises in the said petition described; and this the said defendant prays may be enquired of by the country.

THOMAS T. GANTT, *P'd.*

This answer may be filed without affidavit, and with all the advantages of being sworn to. The defendant admits that he was, at the time of the commencement of this suit, in the possession of the premises in controversy.

E. CASSELBERRY,
Attorney for the Plaintiff.
THOMAS T. GANTT, *P'd.*

And afterwards, and at the February term, 1862, and on the 14th day of February, 1862, the following entry was made therein:

Now comes the plaintiff, by E. Casselberry, attorney, and suggests and shows to the satisfaction of the court that the defendant has departed this life since the commencement of this suit.

Cause continued.

And at the same term and on the 1st of April, 1862, the following order was made herein:

On motion of the plaintiff, by its attorney, until the first of July next is given to amend petition, making legal representatives
10 of defendant parties, and it is ordered that a summons issue for said legal representatives.

And on the 30th of April, 1862, the scire facias for legal representatives of the defendant was issued, in words and figures following:

Scire facias for representatives.

The State of Missouri to the sheriff of Saint Louis county, greeting:

Whereas the Board of President and Directors of the Saint Louis Public Schools, instituted on the ninth day of February, 1861, in the Saint Louis Circuit Court, an action for ejectment against Gottfried Schoenthaler; and whereas it was suggested to the court, on the 14th day of February, 1862, that the said Gottfried Schoenthaler had departed this life; and whereas it has been ordered by our said court, that a scire facias issue to make the legal representatives of said Schoenthaler party defendants to said suit, these are therefore to command to you to summon the said representatives to appear at the next term of the said court, to be begun and held at the city of St. Louis, within and for the county of St. Louis, on the last Monday of September next, then and there to show cause, if any they
11 have, why they should not be made party defendants to said action, and judgment rendered as prayed, and have you then and there this writ.

Witness Stephen Rice, clerk of our said court, with the seal thereof hereto affixed, at St. Louis, April 30th, 1862.

[SEAL.] STEPHEN RICE, *C'lk.*

There is endorsed on said writ, the following return of sheriff:

"*Sheriff's return.*"

Executed this writ in Saint Louis county, on the 23rd day of August, 1862, by reading the same to Mary Schoenthaler, Edward Schoenthaler, Johanna Schoenthaler; further by offering to read the same to Thuseneldo Schoenthaler, Eliza Schoenthaler, and Clara Schoenthaler.

JOHN H. ANDREWS, *Sheff.*
By GEO. STEVENS, *Dep'ty.*

And I did further execute this writ in the county of Saint Louis, on the 22nd day of September, 1862, by reading the same to George Bayha.

JOHN H. ANDREWS, *Sheriff*
By JAMES OWENS, *Dep'ty.*

And on the 15th of March, 1864, the following answer of defendants was filed therein:

12 *Answer of defendants, Mary Schoenthaler and Geo. Bayha.*

The said defendants come and say that the plaintiff is not entitled to the possession of the premises in the petition described, wherefore they pray judgment.

THOMAS T. GANTT,
Att'y for Defendant.

Affidavit waived.

E. CASSELBERRY,
Att'y for Plaintiff.

And at the February term, 1864, and on the 15th day of March, 1864, the following further proceedings were had in this cause, to wit:

Now come the plaintiffs, by their attorneys, and dismissed this suit as to the defendants, Johanna Schoenthaler, Thuseneldo Schoenthaler, Olga Schoenthaler, Clara Schoenthaler, and Edward Schoenthaler, leaving this suit to proceed against the other defendants, Mary Schoenthaler, widow, and George Bayha, administrators of Gottfried Schoenthaler, dec'd, and the said last-named defendants come, by their attorney, and file an answer herein, thereupon come a jury, to wit: Richard Holmes, O. L. Brigham, William Edmonson, Augustus Maas, Emil Gessler, Thomas W. Mattox, Henry Brockman, Heinrich Decke, John McDonough, John Netzger, John C. Hogan, and David Roseman, twelve good and lawful men, who, being
13 duly elected, tried, and sworn, the issues herein joined, well and truly try. The trial progresses, but not being finished is laid over until to-morrow.

And at the same term, and on the 15th day of March, 1864, the following further proceeding were had herein:

Ejectment.

Now again come the parties, by their respective attorneys, and also the jurors empannelled and sworn herein, and the trial progresses, and not being finished, is laid over until to-morrow.

And at the same term, and on the next day, the following further proceedings were had herein.

Ejectment.—Verdict and judgment.

Now again come the parties, by their respective attorneys, and also the jurors empannelled and sworn herein, and the trial progresses, and being finished, the jurors aforesaid, upon their oaths aforesaid, say they find for the defendants. It is therefore considered by the court that the plaintiffs take nothing by their suit in this behalf, but that the defendants go thereof without day, and recover of the plaintiffs their costs and charges in this behalf expended, and have execution therefor.

14 And at the same term, and on the 5th of April, 1864, the following order was made herein.

Motion for new trial overruled.

Now come the parties, by their respective attorneys, and having argued the plaintiff's motion to set aside the verdict and for a new trial, submit the same to the court; and the court having duly heard and considered the same, and being now fully advised in the premises, doth order that the said motion to set aside the verdict and for a new trial be, and the same is hereby, overruled.

And at the same term, and on the first of June, A. D. 1864, the following further proceeding were had herein:

The parties file an agreement herein in the words and figures following, to wit: It is agreed that an appeal bond and an affidavit in appeal be, and the same are hereby, waived, and that the bill of exceptions of the plaintiffs herein may be signed and sealed by the judge of this court at any time before the second day of the next term of this court with like effect, and in every respect as if signed, sealed, and allowed and filed during the present term of this court, and that this agreement be made a part of the record of this cause.

E. CASSELBERRY,
Attorney for the Plaintiff.
THOMAS S. GANTT, *P'd.*

15 And in accordance with said agreement, on motion of the plaintiffs, by their attorney, an appeal is allowed them to the Supreme Court from the judgment herein rendered, and until the second day of the next term of this court is given to file a bill of exceptions.

And on the 25th of June, 1864, the following bill of exceptions was filed.

Bill of exceptions.

Be it remembered, that on the trial of the above cause, the plaintiffs read in evidence the corporation of the town of Saint Louis of the year 1809, in words and figures as follows, to wit:

Common Pleas Court.

Corporation of the town of Saint Louis.

THURSDAY, *November 9th*, 1809.

On petition of sundry inhabitants of the town of Saint Louis, praying so much of said town as is included in the following limits be incorporated, to wit: Begining at Antoine Roys' mil on the bank of the Mississippi; thence running sixty arpens west; thence south on said line of sixty arpens in the rear untill the same comes to the Barrier Denoyer; thence due south until it comes to the Sugar Loaf;
thence due east to the Mississippi; from thence by the Missis-
16 sippi to the place first mentioned. The court having examined the said petition, and finding that the same is signed by two-thirds of the tenable inhabitants residing in said town, order the same to be incorporated, and the metes and bounds to be surveyed and marked, and a plat thereof filed of record in the clerk's office; and David Delanny and William C. Carr are appointed commissioners to superintend the first election of five trustees in pursuance of the law.

STATE OF MISSOURI, *County of Saint Louis, ss:*

I, William J. Hammond, clerk of the Circuit Court within and for the county aforesaid, certify the foregoing to be a true and correct copy of the incorporation of the town of Saint Louis, as fully as the same remains of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of said Circuit Court, at office in the city of Saint Louis, this 1st day of August, 1854.

SEAL.] WILLIAM J. HAMMOND, *Cl'k.*

The plaintiff then read and produced in evidence the out-boundary
of the town (now city) of Saint Louis, approved on the 8th of
17 December, 1840, by the surveyor general of Illinois and Missouri, and purporting to be established in pursuance of the first section of the act of Congress of June 13, 1812, commonly called Plat X. It is agreed that said out-boundary need not be herein inserted, but that the same are a duly certified copy of the original, may be read and used in the Appellate Courts in the same manner and with like effect as if herein inserted.

The plaintiffs then read in evidence school assignment, being survey No. 400, in words and figures as follows, to wit:

School assignment 400.

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
Saint Louis, December 10th, 1855.

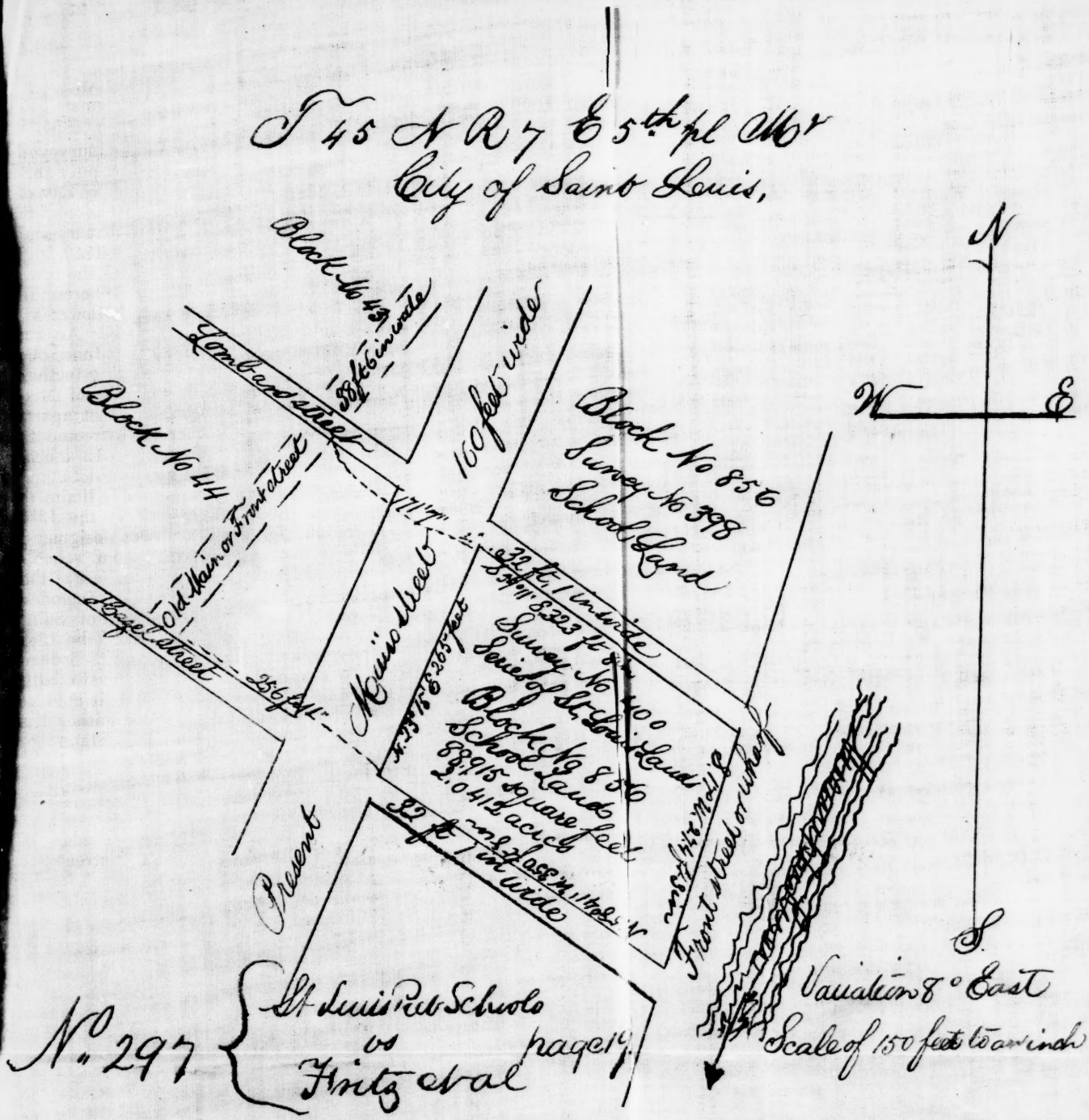
The piece of land below platted and described has been surveyed on the 6th day of December, 1855, by Joseph Indest, deputy surveyor, pursuant to instructions from this office, dated the 3rd day of the same month; and under instructions from the Commissioner of the General Land Office of the 20th August, 1835, 15 January and 18th February, 1839, 5th January, 1843, 17th October, 1849, and 28th June, 1851, it is hereby designated and set apart to the town (now city) of Saint Louis for the support of schools therein, in
18 conformity with the second section of the act of Congress, approved on the 26th day of May, 1824, entitled "An act supplementary to an act passed on the thirteenth day of June, one thousand eight hundred and twelve, entitled 'An act making further provision for settling the claims to lands in the Territory of Missouri.'" The said piece of land hereby designated and set apart, as aforesaid, is situated within the bounds of the survey directed to be made by the 1st section of the act of the 13th June, 1812, aforesaid, so as to include the town lots, out-lots, common field-lots, and commons of the town of Saint Lonis, and is also within the limits of the said town of Saint Louis as it stood incorporated on the 13th June, 1812, and does not, together with all other lands designated and set apart to the town of Saint Louis for the support of schools under the aforesaid 2nd (second) section of the act of Congress of the 26th May, 1824, amount to one-twentieth of the whole lands included in the general survey directed to be made of said town of Saint Louis by the aforesaid 1st section of the act of Congress of the 13th June, 1812. The said piece of land was not, so far as the records of this office show, rightfully owned or claimed by any private indi-
vidual on the said 13th day of June, 1812; nor was it held as
19 common belonging to the said town of St. Louis; neither has it been reserved by the President of the United States for military purposes.

[Here follows map, marked page 19.]

Description.

Beginning at the intersection of the southwestern edge of Lombard street with the southeastern edge of Main street, as established under an ordinance of the city of Saint Louis,
20 dated the second day of March, one thousand eight hundred and fifty-one, and numbered two thousand five hundred and ninety-six, said intersection being the northern corner of this survey, one hundred and seventy-one feet and seven inches south fifty-nine degrees and eleven minutes east from the intersection of the said southwestern edge of Lombard street with the southeastern edge of Main street as it formerly existed; thence south fifty-nine degrees and eleven minutes east with southwestern edge of Lombard street,

T 45 N R 7 E 5th pl Mer
City of Saint Louis,



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School assignment 400.

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
Saint Louis, December 10th, 1855.

The piece of land below platted and described has been surveyed on the 6th day of December, 1855, by Joseph Indest, deputy surveyor, pursuant to instructions from this office, dated the 3rd day of the same month; and under instructions from the Commissioner of the General Land Office of the 20th August, 1835, 15 January and 18th February, 1839, 5th January, 1843, 17th October, 1849, and 28th June, 1851, it is hereby designated and set apart to the town (now city) of Saint Louis for the support of schools therein, in
18 conformity with the second section of the act of Congress, approved on the 26th day of May, 1824, entitled "An act supplementary to an act passed on the thirteenth day of June, one thousand eight hundred and twelve, entitled 'An act making further provision for settling the claims to lands in the Territory of Missouri.'" The said piece of land hereby designated and set apart, as aforesaid, is situated within the bounds of the survey directed to be made by the 1st section of the act of the 13th June, 1812, aforesaid, so as to include the town lots, out-lots, common field-lots, and commons of the town of Saint Lonis, and is also within the limits of the said town of Saint Louis as it stood incorporated on the 13th June, 1812, and does not, together with all other lands designated and set apart to the town of Saint Louis for the support of schools under the aforesaid 2nd (second) section of the act of Congress of the 26th May, 1824, amount to one-twentieth of the whole lands included in the general survey directed to be made of said town of Saint Louis by the aforesaid 1st section of the act of Congress of the 13th June, 1812. The said piece of land was not, so far as the records of this office show, rightfully owned or claimed by any private indi-
vidual on the said 13th day of June, 1812; nor was it held as
19 common belonging to the said town of St. Louis; neither has it been reserved by the President of the United States for military purposes.

[Here follows map, marked page 19.]

Description.

Beginning at the intersection of the southwestern edge of Lombard street with the southeastern edge of Main street, as established under an ordinance of the city of Saint Louis,
20 dated the second day of March, one thousand eight hundred and fifty-one, and numbered two thousand five hundred and ninety-six, said intersection being the northern corner of this survey, one hundred and seventy-one feet and seven inches south fifty-nine degrees and eleven minutes east from the intersection of the said southwestern edge of Lombard street with the southeastern edge of Main street as it formerly existed; thence south fifty-nine degrees and eleven minutes east with southwestern edge of Lombard street,

the northeastern boundary of this survey, three hundred and twenty-three feet and eight inches to a stake set in the westerly line of Front street, the eastern corner of this survey; thence south seventeen degrees west with the westerly line of Front street, the southeastern boundary of this survey, two hundred and seventy-four feet and three inches to a point on the rocks piled upon the dike on Hazel street, the southern corner of this survey; thence north fifty-eight degrees and forty-one minutes west with the northeastern edge of Hazel street, the southwestern boundary of this survey; three hundred and fifty feet and eight inches to a stake at the inter-
21 section of the northeastern edge of Hazel street with the southeastern edge of present Main street, the western corner of this survey; from this corner, the point of intersection of the northeastern edge of Lombard street with the southeastern edge of former Main street, is distant two hundred fifty-six feet and eleven inches; thence north twenty-three degrees and fifteen minutes east with the southeastern edge of the present Main street and northwestern boundary of this survey, two hundred and sixty-five feet, to the corner beginning.

This survey, which is numbered four hundred of the series of Saint Louis lands, being block number eight hundred and fifty-six of the city of St. Louis, situate in township (45) forty-five north of the base line, range seven east of the fifth principal meridian, in the State of Missouri, contains eighty-eight thousand nine hundred and fifteen square feet, equal to two acres and four-hundredths of an acre (2.0412 ac's) of land.

JNO. LOUGHBOROGH,
Surveyor General.

The plaintiffs then read in evidence an act of the legislature of the State of Missouri, entitled "An act authorizing the settling of conflicting claims to certain real estate in the city of Saint Louis,"
22 approved November 23rd, 1857. It is agreed that said act need not be herein inserted, but may be read and used from the statute book in the appellate courts, in the same manner and with like effect as if herein inserted.

The plaintiffs read in evidence a deed from the city of St. Louis to the plaintiffs, dated December 26th, 1857, in words and figures following, to wit:

Deed from the city of St Louis to plaintiff.

This quit-claim deed, made and entered into this twenty-sixth day of December, eighteen hundred and fifty-seven, between the City of St. Louis, party of the first part, and the Board of President and Directors of [of] the Saint Louis Public Schools, party of the second part, witnesseth:

That whereas, by the first section of an act passed by the general assembly of the State of Missouri on the twenty-third day of November, eighteen hundred and fifty-seven, entitled "An act authoriz-

ing the settling of conflicting claims to certain real estate in the city of Saint Louis, the mayor of said city was authorized and empowered, in the name of said city, to convey in fee simple by quit-claim deed, to said party of the second part, the following described pieces and [and] parcels of land in said city of Saint Louis, and in the county of Saint Louis and State of Missouri, to wit: Block eight hundred and
23 fifty-five, bounded on the west by Main street, on the south by Lombard street, on the east by the wharf, and on the north by Mulberry street; also, block number eight hundred and fifty-six, bounded on the west by Main street, on the south by Hazel street, on the east by the wharf, and on the north by Lombard street; and also, all of United States survey, four hundred and three, (of the series of St. Louis lands,) bounded on the west by Main street, on the south by the southern line of said survey, on the east by the wharf, and on the north by Hazel street; which said conveyance was to be made whenever the said party of the second part should convey to said city by quit-claim deed the following described pieces and parcels of land in said city of Saint Louis, to wit: the south half of block eight hundred and fifty-eight, bounded on the west by Main street, on the south by Rutgers street, on the east by the wharf, and on the north by the north half of said block; also, block number eight hundred and fifty-seven south, bounded on the west by Main street, on the south by Convent street, on the east by the wharf, and on the north by Sycamore street; and also, all that part of block number eight hundred and fifty-seven north, which is not included in said survey four hundred and three, bounded on the west by
24 Main street, on the south by Sycamore street, on the east by the wharf, and on the north by said survey.

And whereas said party of the second part has, according to the provisions of the first sections of said act, conveyed by quit-claim deed to said city, of even date herewith, the said three pieces and parcels of land herein last-mentioned and described, being the same which are required by the first section of said act to be conveyed by said party of the second part to said city, as aforesaid:

Now, therefore, the said city of Saint Louis, by John M. Wimer, the mayor thereof, acting under and by virtue of the authority of said act of the general assembly, for and in consideration of the premises and of said conveyance made by the said party of the second part to the said party of the first part, as aforesaid, the receipt whereof is hereby acknowledged, does by these presents remise, release, and for ever quit claim and convey unto the said party of the second part and to the successors and assigns forever, of said party of the second part, all of the right, title, interest, estate, claim, and demand of said city of St. Louis of, in, and to the said three pieces and parcels of land herein first mentioned and described, to wit: Block eight hundred and fifty-five, bounded on the west by Main street,
25 on the south by Lombard street, on the east by the wharf, and on the north by Mulberry street; also, block number eight hundred and fifty-six, bounded on the west by Main street, on the south by Hazel street, on the east by the wharf, and on the north by

Lombard street; and also, all of United States survey number four hundred and three, (of the series of Saint Louis lands,) bounded on the west by Main street, on the south by the southern line of said survey, on the east by the wharf, and on the north by Hazel street.

In testimony whereof, I, John M. Wimer, as mayor of said city of Saint Louis, by virtue in the authority in me vested, as such mayor, by said act of the general assembly of said State, have hereunto set my hand and seal, and have caused the corporate seal of said city to be hereunto affixed, and the register of said city, Joel G. Harper has attested the same under said corporate seal, the day and year first aforesaid.

[SEAL.] JOHN M. WIMER, *Mayor.*

Attest:

[SEAL.] J. G. HARPER,
City Register.

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered, that on the twenty-eighth day of Decem-
26 ber, A. D. 1857, before me, the undersigned, a notary public within and for the county and State aforesaid, came John M. Wimer, who is personally known to me to be the same person who executed the foregoing deed as mayor of the city of Saint Louis; and he acknowledged the same to be the act and deed of the city of Saint Louis, and his act and deed as mayor of said city for the purposes therein mentioned.

Witness my hand and notarial seal the day and year last aforesaid.

SAMUEL A. BENNETT,
Notary Public.

STATE OF MISSOURI, *County of Saint Louis, ss:*

I, the undersigned recorder in and for said county, do hereby certify that the foregoing instrument of writing was filed for record in my office January 2nd, 1858, and is truly recorded in book 196, page 225.

Witness my hand and official seal the date aforesaid.

[SEAL.] C. KEEMLE, *Recorder.*

The plaintiffs then read in evidence deed from plaintiff to the city, dated December 26th, 1857, in words and figures, as follows, to wit:

27 *Deed from plaintiff to the city.*

This quit-claim deed, made and entered into this twenty-sixth day of December, eighteen hundred and fifty-seven, between the Board of President and Directors of the Saint Louis Public Schools, party of the first part, and the city of Saint Louis, party of the second part, witnesseth:

That whereas, by the first section of an act passed by the general assembly of the State of Missouri, on the twenty-third day of Nov-

ember, eighteen hundred and fifty-seven, entitled "An act authorizing the settling of conflicting claims to certain real estate in the city of Saint Louis," the mayor of said city was authorized and empowered, in the name of said city, to convey in fee simple, by quit-claim deed, to said board, the following pieces and parcels of land in said city of Saint Louis, and in the county of Saint Louis and State of Missouri, to wit: Block eight hundred and fifty-five, bounded on the west by Main street, on the south by Lombard street, on the east by the wharf, and on the north by Mulberry street; also, block number eight hundred and fifty-six, bounded on the north by Main street, on the south by Hazel street, on the east by the wharf, and on the north by Lombard street; and also, all of United States survey number four hundred and three, (of the series of St. Louis lands,) bounded
28 on the west by Main street, on the south by the southern line of said survey, on the east by the wharf, and on the north by Hazel street; which said conveyance was to be made whenever said board should convey to said city, by quit-calim deed, the following described pieces and parcels of land in said city of Saint Louis, to wit: the south half of block eight hundred and fifty-eight, bounded on the west by Main street, on the south by Rutger's street, on the east by the wharf, and on the north by the north half of said block; also, block eight hundred and fifty-seven south, bounded on the west by Main street, on the south by Convent street, on the east by the wharf, and on the north by Sycamore street; and also, all that part of block number eight hundred and fifty-seven north, which is not included in said survey four hundred and three, bounded on the west by Main street, on the south by Sycamore street, on the east by the wharf, and on the north by said survey:

And whereas said city has, according to the provisions of the first section of said act, conveyed in fee simple, by quit-claim deed, to said board said three pieces or parcels of land herein first-mentioned and described, being the same which are required by the first
29 section of said act to be conveyed by said city to said board, as aforesaid:

Now, therefore, the said party of the first part, for and in consideration of the premises, and of said conveyance made by the said city to said board as aforesaid, the receipt whereof is hereby acknowledged, does by these presents remise, release, and forever quit claim, and forever convey unto the said party of the second part and to the successors and assigns forever, of the said party of the second part, all the right, title, interest, estate, claim, and demand of said party of the first part, of, in, and to the said three pieces and parcels of land herein last mentioned and described, to wit: the south half of block eight hundred and fifty-eight, bounded on the west by Main street, on the south by Rutgers street, on the east by the wharf, and on the north by the north half of said block; also block number eight hundred and fifty-seven south, bounded, on the west by Main street, on the south by Convent street, on the east by the wharf, and on the north by Sycamore street; and also all that part of block number eight hundred and fifty-seven north, which is not included in

said survey four hundred and three, bounded on the west by Main street, on the south by Sycamore street, on the east by the wharf, and on the north by said survey.

30 In testimony whereof, the president of said board has hereunto set his hand and affixed the corporate seal of said board, and the secretary thereof has attested the same under said seal, the day and year first aforesaid.

[SEAL.] W. W. GREENE, *President.*

Attest:

C. E. P. JOHNSON, *Secretary.*

STATE OF MISSOURI, *County of Saint Louis, ss*:

Be it remembered, that the foregoing-named William Greene, the president of the foregoing-named Board of Directors of the Saint Louis Public Schools, who is personally know to me to be the same person whose name, as president of said board, is subscribed to the foregoing deed as a party thereto this day personally appeared before me, and acknowledged the same to be the act and deed of board and his own act and deed as president thereof.

Given under my hand this thirty-first day of December, eighteen hundred and fifty-seven.

PETER W. JOHNSON,
Justice of the Peace of the said county of Saint Louis.

Filed and recorded January 2nd, 1858.

C. KEEMLE, *Recorder.*

STATE OF MISSOURI, *County of Saint Louis, ss*:

31 I, the undersigned recorder for said county, certify that the foregoing is a true copy of a deed from Saint Louis Public Schools to city of Saint Louis, the certificate of ackowledgment, and the date of filing and recording, as the same remains of record in my office, in book 196, page 221.

Witness my hand and official seal this 16th day of March, 1864.

[SEAL.] A. C. BERNOUDY, *Recorder.*
Per J. CONRAD, *Dep'ty.*

The plaintiffs then read in evidence an act of the legislature of the State of Missouri, entitled "An act about swamp lands in Saint Louis county," approved March 3rd, 1851. It is agreed that said last-mentioned act need not be herein inserted, but that the same may be read and used from the statute book in the same manner and with like effect as if herein inserted.

The plaintiffs then read in evidence an agreement or stipulation between the parties in words and figures as follow, to wit:

Stipulation.

The parties to the above cause make the following agreement, in order to facilitate the trial in cause:

First The plaintiffs may read in evidence on the trial in the

32 above cause the deposition of William Boly, taken in a case in the Circuit Court of Saint Louis county, wherein said board was plaintiffs, and James Howard, Andrew Donnarre, and William Quigley were defendants.

Second. The defendants were in possession of the premises in controversy at the time of the commencement of this suit.

Third. That a certified copy of the plat in the United States recorder's office, known as "Chouteau's plat," of the old town of Saint Louis, may be read in evidence by either party in this cause, with the same effect that the original would have.

THOMAS T. GANTT, *p. q.*
E. C. CASSELBERRY, *Att'y for Plaintiffs.*

The plaintiffs then read in evidence the act of Congress of June 13th, 1812, entitled "An act making further provision for settling the claims to land in territory of Missouri;" also the act of Congress of May the 26th, 1824, entitled "An act supplementary to an act passed on the 13th day of June one thousand eight hundred and twelve, entitled 'An act making further provision for settling the claims to land in the Territory of Missouri.' And also the act of Congress of January 27th, 1831, entitled "An act further supplemental to the act entitled "An act making further provision for set-

33 tling the claims to land in the Territory of Missouri," passed the thirteenth day of June, one thousand eight hundred and twelve." It is agreed that said three acts of Congress need not be herein inserted, but that the same may be read and used from the statute books in the same manner and with like effect as if herein inserted.

Here the plaintiff rested their case.

The defendant then offered to read in evidence a concession and translation thereof, dated March 1st, 1788, to Charles Levelle, to the reading of which the plaintiffs objected, on the ground that the same is incompetent and irrelevant evidence on the issues, and also on the ground that said concession is void on account of uncertainty of the description of the land therein alluded to, which said objections were overruled and said concession and translation thereof were read in evidence, in words and figures as follows, to wit:

Concession to Charles Levelle, March 1st, 1788.

I, Manuel Perez, captain of the infantry regiment of Louisiana, lieutenant governor and commandant of this western part and districts of Illinois, having seen the statement in the petition presented by Charles Lebelle, a free negro, who was the slave of the late Louis Robert, dated the sixth day of February, of this current year, I have

34 conceded and I do concede to himself, his heirs and assigns, in fee simple, a lot of ground of sixty feet front only by one hundred and fifty feet deep, situated in this town of Saint Louis, bounded on one side to the lot of Louis Ride's heirs, on the other by the king's domain, on its rear by the Mississippi river, and

on its principal front by the road which leads from Second street to the Prarie a Catalan, under the condition to settle on the same and improve it within the term of one year from this date, for want of which the same shall reverse to the king's demain, it remaining subject to the public and other charges that it might please his majesty to impose thereon.

Done in Saint Louis of Illinois, on the 1st March, 1788.

MANUEL PEREZ.

RECORDER'S OFFICE,
Saint Louis, 27 *February*, 1850.

I have correctly translated the above from folio 20, of Livre Terrien, No. 4, in this office.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

D'n Manuel Perez, captan del regimento de infantearia de la Luysiana, Thente de Gobernador y comandante de esta partida accidental y distrito de los y lin'c. Uisto lo espuesto en el memo-
35 rial presentado por Carlos Lebelle, negro libre, y esclavo que fue del De'pento seys Reben con fha de veinte y seis de Febrero reel corriente aris, le he, conzutido y conzede a titulo de de propiedad para el y sus herederos y otras que representen su derecho sur terreno de solo ses enta pies de frente, sobre ciento y cinquenta de profunder, situado en este pueblo de Sn. Luys, que confina por un lado a los herederos de Luys Ride por el otro al Dominio de S. M. per detras al rio Missysypy, y por su principal frente al carrieno que singue de la segunda calle prinzipal a la praderia a Cathalan, con condecion de establecerlo y hazerlo valer en il termino de un ano a coutar vesde esta fha, y de lo contrario que vara incorporado al Dominio Real, debiendo estar sugeto a los cargos publicos y otras que S. M. guiera impauerle.

Dado, en Sn. Luyo de Hynneses a primero de mazo de mil sepzientos ochenta y ocha.

MANUEL PEREZ.

OFFICE OF THE RECORDER OF LAND TITLES,
Saint Louis, 6*th July*, 1860.

I certify that the above is correctly transcribed from page 20, of Livre Terrien, No. 4, on file in this office.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

36 *Jno. B. Hortez' testimony.*

The defendant then called John B. Hortez as a witness, who says: I am 27 years old; was born March 11, 1792, in the State of Missouri, at St. Genevive; came to St. Louis when three months old; have lived here ever since. At the change of government, I lived at the corner of Poplar and Main; knew Levelle in 1808, and where he

lived; I moved into the country, a few miles in 1806, and moved back in 1808. Levelle and his wife were negroes; he lived on lot in the town of Saint Louis at the time of the change of government; his eastern boundary was the Mississippi, his western boundary Second street; it was the south half of the block 44 he lived on; there was an old house on the lot, a garden and orchard, pears, apples and plums. I was six years old when servant girl took me there the first time. Levelle lived on the lot when he died, and his wife after him until about in fall of 1821; I picked fruit there; old woman died on the same lot; there were trees there as big as the stove—the stove in the room—15 inches in diameter, in 1808, after I came from the country; my sister lived awhile on the lot, after Levelle's wife died. Pierre Lougtain lived there on a part of the lot after 1825.

Schoenthaler has been in possession of that which he claimed
37 in block 44 a long time. I cannot say how long.

Cross-examination of J. B. Hortez.

I went on the lot first when I was six years old; afterwards went there most every day from 1808 to 1827; we went to the country in 1806; returned in 1808; at that time, Main street stopped at Plum street. As the bank of the river would wash in, the people would move back their fences; sometimes there was scarcely room to pass on foot between the fences and the river. I am speaking of what was the case as early as I was able to travel there since 1808, and before 1808. I didn't notice the river front much before 1808. Every rise of the river would take some of the bank away, a good deal of it went down in 1814. After 1844, the river receded eastward. In October, 1814, I started for New Orleans. There was very high water then, unusually high. I returned in June, 1815, and tied my boat at old Tayon's barn. That was the highest water we had until 1844. The river is not now as it was in Spanish times. Old Mrs. Adams used to be able to stand on her lot and talk to the ferry man on the other side. There was no rock on the shore below Plum street. Above Plum we had solid rock all the way to Cherry street.

At Spruce street, I had a brother who had a barn on the 2nd
38 bank of the river. Between Spruce and Myrtle street, there was a ledge of rock under which the water ran. I can't tell you whether the possessions of the old people below Plum street went to the river. The fences went as far eastward as they had solid ground to put them on; the boatmen at places walked on top of the rocks; can't tell you how much space they had. I sometimes had scarcely room to get along between the fences and the river, holding on to the fence as I went along. I was as close to the river as that.

J. Pourcelli's testimony.

John Pourcelli, another witness on the part of the defendant, says: I am 80 years of age the last of this month; was born in Saint Louis; parents resided on Main street, about three squares above Plum street. I remember the negro man, Charles Levelle, and his wife;

they were both negroes. I knew him when a small boy 15 or 16 years old. I knew till he died; he lived on Second street, on one of the last lots of the town of Saint Louis; the lot is bounded on the south by an open lot, which had no houses on it; on the north by Madame Charleville, on the east by the Mississippi river; the lot was enclosed and went to the edge of the river bank; only a path way between it and the river; when I was 15 years old, there was
39 good apples growing on the lot: I ate them often. Levelle's house was old fashion post on end; cannot say when he died; think he died before change of government; he died at his house; his wife died there too. I remember the battle of New Orleans. Mrs. Levelle died, I think, before that battle in 1809. I lived in the city of Saint Louis until 1820. Major Schoenthaler lived on Levelle's lot afterwards; south of this lot was a street, but do not know name of it; I believe it was Hazel street. In Spanish times, I cannot say whether the river was closer or further from Second street then where Main street now is. I do not know who lived there in 1820, when I left Saint Louis.

Cross-examined.

The foot path was small. Cattle and people could pass when I first knew it, may be three or four feet wide; those that wanted to pass there could pass. The river went in further west in Spanish times than Main street now is; cannot say how far it was from 2nd street opposite Levill's lot, small path went whole way down river bank; people passed there that had business as they did on streets and alleys; at places where carts and horses could pass, they did pass; at some places there was no room for horses or carts, hardly for a man. Main street did not go below Plum street in Spanish times. In
40 coming up from Carondelet you crossed a bridge over a gully about where Plum street now is, and then you come to Main street. The paths I speak of above Plum street, east of Main street, was under the rocky bluff.

Testimony of P. D. Barada.

Peter D. Barada, a witness on the part of the defendant, says: I will be 65 years old on the 11th of next September, (1864.) I know the property; it is the northwest corner of Hazel and Second street. I remember Levelle's occupying there in 1806 or 1807; could not say particularly when Levelle died; he died between 1810 and 1813; his wife continued to live there some time after his death; at the time, I recollect one Francis Tayon lived there, north of this lot in block 44; the Schoenthaler property or possessions is within the Levelle possessions in block 44; the Levelle lot was bounded west by Second street, south by vacant land, now Hazel street, east by river, north Tayon. The ground was partly enclosed by cedar picket fence, partly rail fence. This fence run about 200 to 300 feet back, which carried it back close to the river; the fence was moved westwardly as the river washed in. I lived in Carondelet since 1803; came to Saint Louis frequently after I was ten years old; at that time the river was

at least 450 yards nearer to Second street than now. I re-
41 member fruit trees on Levelle's lot; do not remember who lived there after Mrs. Levelle died. In the latter part of 1819, I boarded with Mrs. Tayon; do not know who lived there then; old house had gone to wreck.

Cross-examined.

I was about six or seven years old when I first noticed this lot; do not recollect any tow-path at that quarter. Do not think I was near the river bank then; I was young and had been cautioned to keep away from high banks, which were caving in. I know where new Main street is; the bank of the river was then further west than where new Main street now is. I noticed the river north of Plum street; there was a foot-path on the bluff in some places; at other places the fence came to the river. At very low water they would go under the bluff, but could not go there when the river was at middle stage. I have no recollection as to whether the fence of Levelle went to the river bank or not; I was very young, and did not notice such thing particularly.

Testimony of D. Adams.

David Adams, a witness on the part of the defendant, says: I am 67 years old. I was born in St. Louis, on the southwest corner of Plum and Main. I spent my youth in Saint Louis; went on the first voyage when a little over 15 years old, to New Mexico. I
42 remember old Levelle's wife, but I do not remember the old man; I remember her from the change of government. She lived on 2d street and Hazel, southwest corner of the block (44;) she lived in a French-built house; there was a garden and an orchard; all kinds of fruit in the orchard; some very large trees; some as big around as my body; the lot was enclosed; part picket fence; lower part rail fence; by lower part I mean the eastern portion; the fence went to the bank of the river, leaving a little path for the old woman's cow to come in; she kept the path on the east for her own use of the back part of the lot; do not remember when old man died; think the old woman died sometime in 1820 or 1821; she was alive when I returned from Mexico in 1819; the path at the east of this lot was narrower than above; it was very narrow; not more than 3 or 4 feet wide; just room enough for a cow to get into the yard; cart could not go along there; fence was afterwards moved back by Loughlin and left more room there; I remember Joseph Loughlin living there after old woman died; Schoenthaler was inside on Levelle's north and south lines; Schoenthaler is dead. I do not know that he ever was in the military service; Schoenthaler went there on block 44, about 1831 or 1832; cannot say exactly. I heard of
43 Schoenthaler's death last fall; Francis Hemands lived on the lot in old times after Mrs. Levelle; then Joseph Marvilles; but I can't tell the year they lived there.

Cross-examined.

The river was further west when I first knew it than where Main street now is; a deep channel used to be where Main street now is. The fence ran clear up to the bank of the river, when I first knew it, fully 200 feet from 2nd street. I used to go down with my father to his land and used to pass this land, and when water was high I had to scramble over the fence, and sometimes not find splace enough to pass by end of fence between fence and the river, not the breadth of my hand sometimes; when the river was down it was a steep bank between the water and fence, and only a pass-way, because it was a steep bank; this was in 1805 or 1806, '7, '8, '9, and '10; above Plum street there was, at low water, a rocky, shelving bank, up to Almond street, where the rock broke off and then commenced again above Market and ran to Cherry street; we could pass at low water, not at middle stage; from Hazel to Plum street had in some places a pass-way; in some places had to get over the fence to get along; this I have explained before. There was a tow-path along the river
44 all the way to Counsel Bluffs. In many places the fences ran to the bank, and then the voyagers got over them.

Testimony of R. Dowling.

Richard Dowling, on the part of the defendants, says: I live in the city of Saint Louis.

Here a receipt is shown to the witness by the defendant, in words and figures as follows, to wit:

Receipt.

Execution No. 90 and 93. Received Saint Louis May 4th, 1854, of G. Schoenthaler, esq., seventy-nine 30-100 dollars, in full for his assessment by the city of Saint Louis in opening South Main street, in blocks No. 44 and 856, in the city of St. Louis.

$29 30-100. FRANCIS MOLAIR,
City Marshal.
By R. DOWLING, *Dep'ty.*

The witness then said as follows: Mr. Schoenthaler was in possession of the land sued for two years before he died. I do not remember when he died; it was more than two years ago, I believe; I do not remember the exact time; he claimed the land as his own; I am fifty-eight years old. I remember Mrs. Levelle; she lived on
45 the corner of Second and Hazel streets, on east side of Second street, north of Hazel; never saw her husband; think I never saw her off the place in my life. I knew the lot in 1817; Tayon then occupied north part of block 44. Mrs. Leville's lot was closed with picket and rail fences; front on Second street was pickets; rails on the east fence went east to the river, or within a foot or two of it; cows or horses could pass along; there was a little building set back in the lot in 1817; it was two hundred feet or more from Second street to the river; when the river was up it would come inside

of the fence; when it fell there was a kind of a bar; have seen many changes in the river since that time. In 1822 fruit trees as big as my body and apple trees were there; they are of slow growth; take twenty years to grow as large as they then were, if they were of the ordinary size when set out; some of those were near the river; the passway at the east of the lot was three or four feet wide. I have had to hug the fence to get along in some places; the bank was steep; the river, I think, in 1823 washed away the bank considerable; the pass was used by Mrs. Smith to get wood in. Don't know that any one else used it; cattle could pass there; on the upper part of the block, road was a little wider.

Cross-examined.

Mr. Schoenthaler did about two years ago; there is people
46 there claiming title to the lot; they are in a small brick cottage, not much value; probably worth two or three hundred dollars, or may be not so much as that; the house has not been there more than two or three years. Bayha claims ownership of the lot as administrator of Schoenthaler estate; the property in dispute is east of new Main street; it was assessed, and he (Schoenthaler) paid me the assessment on it; in 1819 or 1820, in high water, the island made from two to three feet; in 1825 some 5 or 6 feet. I have seen the bar as far up as Walnut street. The river began to go east about 1844; in 1844 this property was all overflowed; 2½ feet of water was on it; this was the year of the great overflow of the river.

The defendants then offered to read in evidence the said receipt herein copied, which was shown to the witness, Dowling, and the plaintiff objected to the reading of the same as irrelevant and incompetent; which said objection was overruled by the court, and said receipt was read in evidence, and the plaintiffs at the time excepted to the decission of the court in overruling said objection; said receipt is the same receipt herein copied, which was signed by Francis Molair, city marshal, by R. Dowling, dep'ty. The defendant announced, (and it was only on that ground that the court admitted the testi-
47 mony,) that he offered this tax receipt in aid of evidence of possession by Schoenthaler of the premises in controversy.

Charles Sanguinette.

The plaintiff, in rebuttal, then produced Charles Sanguinette as a witness, who says: I was born in Saint Louis; I am eighty years old; I have lived in Saint Louis the greater part of my life; I lived in the centre of the city the early part of my life, on the block south of the church. I knew the southern portion of the city of Saint Louis in Spanish times; from the south line coming up there was always a road up on the top of the bank, from 15 to 16 feet wide; do not think it was any less; carts went along it; they used to go back and forward and to haul wood along it. I knew the wharf all along in front of the old town of Saint Louis, in Spanish times; it was only at low water that they could pass all the way in front of the town; there

was a road on top of the bank from 12 to 15 feet wide in some places, and in some places less. I knew the negroes Levelle; there was a road between them and the river from 15 to 16 feet wide, in Spanish times, and not less. I passed there often when I was a boy as often as twice a week. I knew Madam Charleville; I visited them in Spanish times every Sunday; I was a friend of the family.

48 *Cross-examined.*

The road crossed Mill Creek on a bridge; the bridge is where it was formerly; it was the road to Carondelet. Main street, in those times, went down beyond Levelle some distance; above Levelle Main street came to the river; from where it came to the river above Levelle, to the lower end of the town, it was only a pass-way about 15 or 16 feet wide; it was at least 15 feet wide east of Levelle's lot. I considered it a street; it was a continuation of Main street; my memory is good; Carondelet road, that crossed the bridge, came into Second street. I think Main street passed east of Levelle at the time of the change of government; there was no fences or enclosure that run down to the river to obstruct the road; this road was on the top of the bank.

Testimony of Geo. Bayha.

The plaintiff then called George Bayha as a witness, who testified as follows: Mr. Schoenthaler died in 1861; I am administrator of his estate. I know the property in block 44; the property in dispute is on the east side of Main street. I took out letters of administration in 1861, on the east side of Main street, in block 856. I have possession as administrator for the benefit of the estate, and all others interested in the estate. The part I have in possession is the
49 part in dispute in this case. I have had it in possession ever since I was appointed administrator. I have known block 856 ever since it was a block; part of the block was enclosed by Mr. Schoenthaler a year or two before he died; before that time block 856 was not enclosed or occupied by any one; it laid open.

Here the defendant announced that he did not set up title to the land in dispute under any statute of limitations.

Deposition of Wm. Boly.

The plaintiff then read in evidence the deposition of William Boly, taken October 16th, 1862, in the words and figures as follows, to wit: William Boly, of lawful age, being produced, sworn, and examined on part of the plaintiff, doth depose and say: I was born on the Ohio river, coming to this country in or about 1785 or 1786. I was seventy-five years old last March. Missouri has been my home since childhood. I lived in St. Louis in Spanish times. I lived on the west side of Main street in St. Louis during Spanish times; what I mean by Spanish times is prior to December 20th, 1803. I knew the southern portion of Saint Louis in Spanish times; there were but

few houses there then. During Spanish times Main street in said city run to Baptiste Le Beans; then it became a tow path or passway about 25 feet wide down to Mill creek; the path or passway was for public use, that is it was the common understanding of the people that it was for public use; everybody used it as a public passway.

Cross-examination.

By defendants' attorney:

By Spanish times I mean when the Spaniards ruled here. I do not remember how old I was when the Spanish government ceased. I mean by tow-path or passway, the boats stopped there when they were going up the river, and the hands of the boats towed boats there. When the river was high, the hands of the boats towed the boats by walking on the bank, and when the river was low, walked under the bank. I do not know whether people (other than boat hands) passed up and down the pass way; they could have done so, I suppose. I don't know how far Mill creek was from Le Beans.

WILLIAM BOLY.

The plaintiff then read and produced in evidence the following plats, papers, and documents:

1. Chouteaus plat of the old town of Saint Louis, certified by the United States recorder of land titles to be a copy of the original on file in his office.

2. The plat of the town of Saint Louis, compiled by Surveyor General Conway, dated March 12th, 1846.

3rd. A plat of the town of Saint Louis, by James M. Loughborough, certified April 14th, 1859, by Surveyor General Loughborough.

4. A plat of township 45, north range, seven east, in the State of Missouri by Frederick Mosberger.

It is agreed that said plats being the items of evidence, No. 1, 2, 3 & 4, above-mentioned, need not be herein inserted, provided that the same or properly authenticated copies of the originals from which the same were taken, be filed in the Supreme Court for the use of the parties at the time the record is filed in the Appellate Courts in the same manner, and with like effect as if the same were inserted herein.

The plaintiff then read in evidence certified copies of blocks 43, 44, and 45, of the town of Saint Louis, made by the United States, in words and figures as follows, to wit:

Certified Copy.—Block 43.

Survey No. 36 of Saint Louis city lands, plat, and description of the out-boundary lines of block No. 43, in the city of Saint Louis, surveyed by Joseph C. Brown, deputy surveyor, under instructions from the surveyor of the public lands in the States of Illinois and Missouri, dated the 15th September, 1835.

[Here follows map marked page 52.]

53 *Description.*

Begin at the northwest corner of the block, at the intersection of Mulberry street with Second street, from which the picket set by the city surveyor at the intersection of the central lines of Mulberry and Plum streets is 19 feet 3 inches westward, and 16 feet ½ inch northward; also the S. W corner of a small brick house on block No. 42 is 31 feet 6¾ inches northward, and five feet eight inches eastward of the east edge of Second street. Thence S. 64° 7′ E. along the south edge of Mulberry street 320 feet 10 inches, the N.E. corner of the block from which a picket driven at the intersection of the west edge of First street, with the central line of Mulberry street is 16 feet ½ inch northward; thence S. 30° 15′ W., along the west edge of First street, 303 feet 9 inches, the southeast corner of the block at the intersection of Lombard street with First street, at which point of intersection a picket is driven (by Jos. C. Browne) into the ground from which the N.E. corner of a large slaughter house on block No. 44 is 88 feet 8 inches westward from the west edge of First street, and 33 feet 2 inches southward from the north edge of Lombard street; thence N. 59° 11′ W. along the north edge of Lombard street, 320 feet 10 inches, the S. W. corner of the block, at the intersection of Lombard street, with Second street, from which the N.E. corner of a brick house on block No. 49 is 38 feet 1¾ inches
54 westward, and 32 feet 1 inch southward, being just at the edge of Lombard street, and 4¼ inches eastward on Second street; thence N. 30° 30′ E., along the east edges of Second street, 275 feet 9½ inches the beginning N.W. corner of the block.

SURVEYOR'S OFFICE, *Saint Louis*, 17*h May*, 1845.

The above plat and description of the out-boundary lines of block No. 43, in the city of Saint Louis were this day recorded and approved as being strictly conformable to the field notes of the survey thereof.

SILAS REED,
Surveyor of the Public Lands
in the State of Illinois and Missouri.

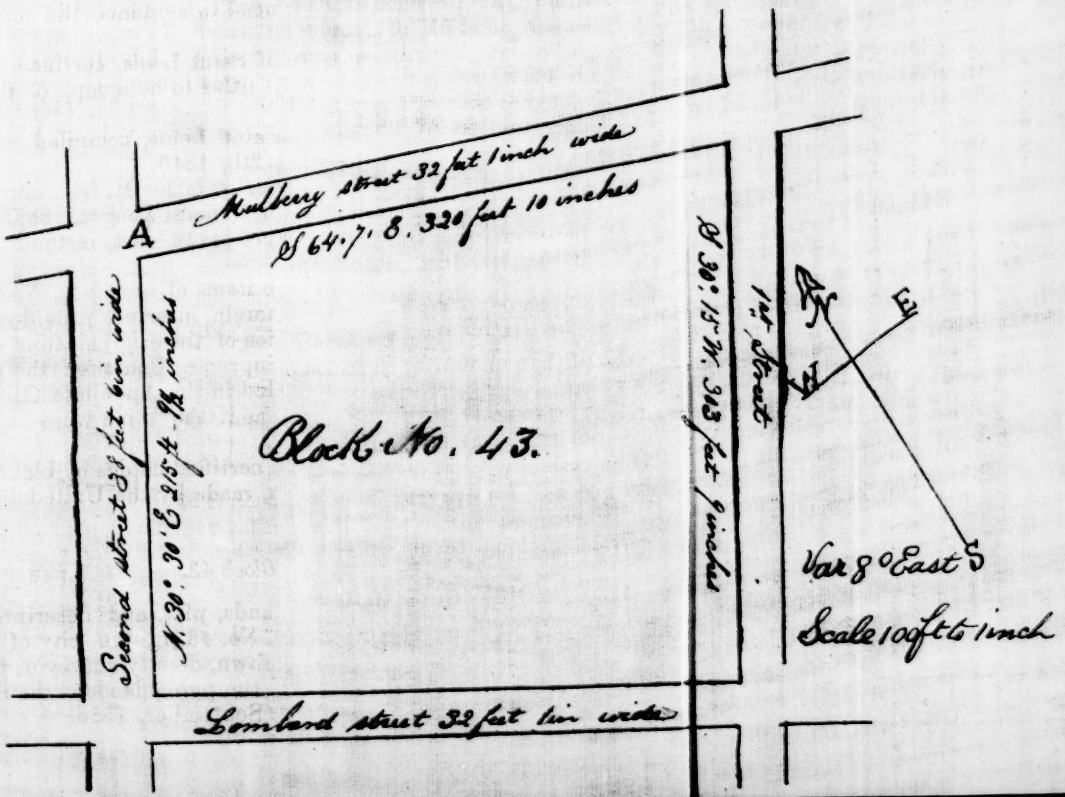
OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
Saint Louis, 2*nd September*, 1857.

The foregoing plat and description of survey of block No. 43, of the city of Saint Louis, and the certificate of the approval thereof, are correctly copied from page 63 of the record book of surveys in Saint Louis lands on file in this office.

JOHN LONGBOROUGH,
Surveyor General.

No. 297 St Louis Pub Schools vs. Filz et al

Page 52



Survey N. 37 of Saint Louis City Lands.—Copy of block 44.

Plat and description of the out-boundary lines of block No. 44 in the city of Saint Louis, surveyed by Joseph C. Brown, deputy surveyor, under a contract with the surveyor of the public lands in the States of Illinois and Missouri, dated the 15th of September,
55 1835.

[Here follows map marked page 55.]

Description.

Commence at the northwest corner of the block, at the intersection of Lombard and Second streets, from which the N.E. corner of a brick house on block No. 49 is 38 feet 1¾ inches westward, just at the south edge of Lombard street; thence S. 59, 11 E., along the south edge of Lombard street, 320 feet 10 inches, the N.E. corner of the block at the intersection of Lombard street with First street, from which the N.E. corner of a large slaughter house is 88 feet 8 inches westward, and 1 foot 1 inch southward, being so far from the south edge of Lombard street; thence S. 41° 30′ W. along the west edge of First street, 264 feet 6 inches, the S.E. corner of the
56 block, at which no witness is taken, on account of the whole of First street along this block being very low, and often washed by a sloo of the river; thence N. 58°, 41′ W., along the north edge of Hazel street, from its intersection with the west edge of First street (the S.E. corner of the block) 270 feet, the S. W. corner of the block at the intersection of Hazel street, with Second street, from which the S.W. corner of a plank enclosure on the block is 1 foot northward and 2 feet four inches eastward from the east edge of Second street; also the N.E corner of a plank enclosure of block No. 48 is 38 feet 7½ inches westward, and 31 feet 6½ inches southward, being 1½ inches westward from the west edge of Second street, and 6½ inches northward of the south edge of Hazel street, being so far in upon said street; thence N. 30°, 30′ E., along the east edge of Second street, 257 feet 5 inches to the beginning N.W. corner of the block.

SURVEYOR'S OFFICE, *Saint Louis, 17th May*, 1845.

The above plat and description of the out-boundaries of block No. 44, in the city of Saint Louis were this day recorded and approved as being strictly conformable to the field notes of the survey thereof.

SILAS REED,
Surevyor of the Public Lands,
in the States of Illinois and Missouri.

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
St. Louis, 2nd September, 1857.

57 The foregoing plat and transcript of survey of block No. 44 of the city of Saint Louis, and the certificate of the

approval thereof, are correctly copied from page 64 of the record book of surveys of Saint Louis lands on file in this office.

JNO. LOUGHBOROUGH, *Surveyor General.*

Survey No. 38 *of St Louis city lands.—Copy survey.*

Plat and description of the out-boundary lines of block No. 45, in the city of St. Louis, surveyed by Joseph C. Brown, deputy surveyor, under a contract with the surveyor of the public lands in the States of Illinois and Missouri, dated the 15 of September, 1835.

(Here follows map marked page 57.) See over for plat.

58 *Description.*

Begin at the N. W. corner of the block, at the intersection of Hazel street with Second street, from which the N. E. corner of the plank enclosure of block No. 48 is 38 feet 7½ inches westward and 6¼ inches northward, being so far in upon Hazel street; also the northeast corner of the wooden part of a framed house is ½ an inch northward, being so much in upon Hazel street, and 63 feet 8½ inches eastward from the east edge of Second street; thence S. 58° 41′ E. along the south edge of Hazel street, at 42 feet 4½ inches, intersect the N. E. line of the survey of the claim of John Baptiste Provencheres, legal representatives of 1½ by 3 arpents, 160 feeet 4¾ inches S. 11° 50′ E. from the most northern corner thereof, 263 feet 9 inches; the N. E. corner of the block at the intersection of Hazel street with First street, from which the east edge of a large round log, of a post at the N. E. corner of an enclosure on the block is 65 feet 4½ inches westward; the north edge of said log-post is 11½ inches southward from the south edge of Hazel street; thence S. 41° 30′ W. along the west edge of First street, at 208 feet 8 inches, intersect the N. E. line of Provencheres' survey, 4 inches N. 11° 50′ W. from the N. E. corner thereof, 261 feet 7 inches, the S. E. corner of the block, at the intersection of Sycamore street with First street, at which corner a picket is driven (by
59 Jos. C. Brown) into the ground. There is no permanent object to notice, as a witness to the corner. Thence N. 58° 41′ W. along the north edge of Sycamore street, 213 feet 10⅔ inches the S. W. corner of the block at the intersection of Sycamore street with Second street, from which the southwest corner of a brick house on the block is 1 foot northward from the north edge of Sycamore street, and 7½ inches eastward from tne east edge of Second street; thence N. 30° 30′ E. along the east edge of Second street 256 feet 8 inches, the beginning N. W. corner of the block.

SURVEYOR'S OFFICE,
Saint Louis, 17th May, 1845.

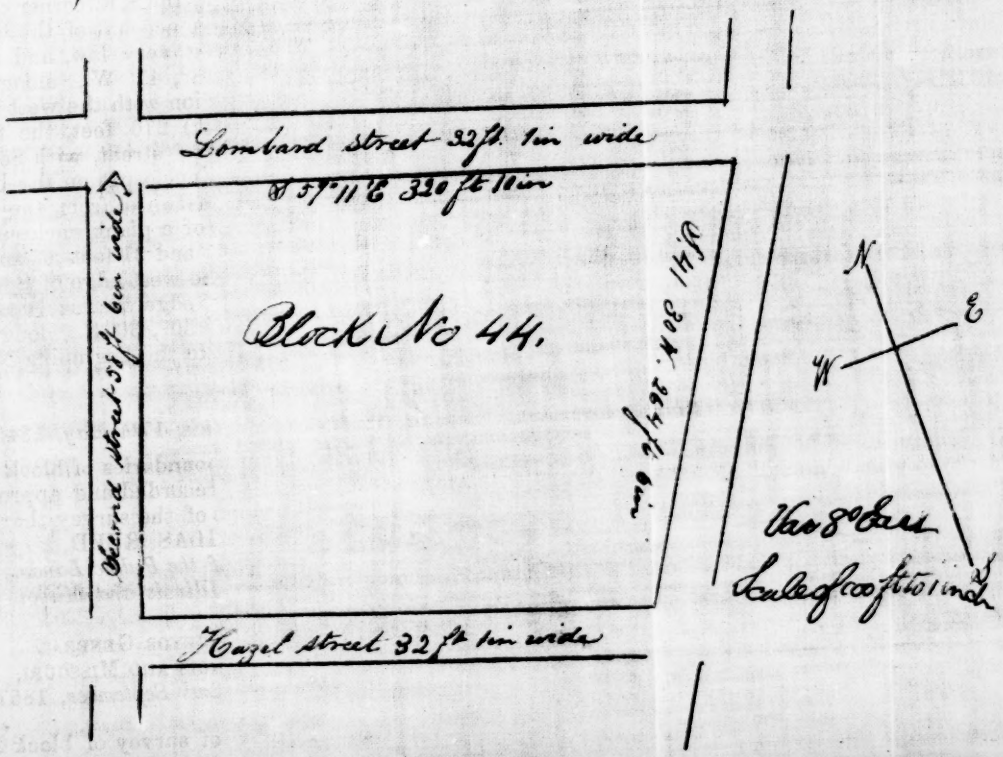
The above plat and description of the out-boundaries of block No. 45, in the city of Saint Louis, were this day recorded and approved as being strictly conformable to the field-notes of the survey thereof.

SILAS REED.
Surveyor of the Public Lands in the States of Illinois and Missouri.

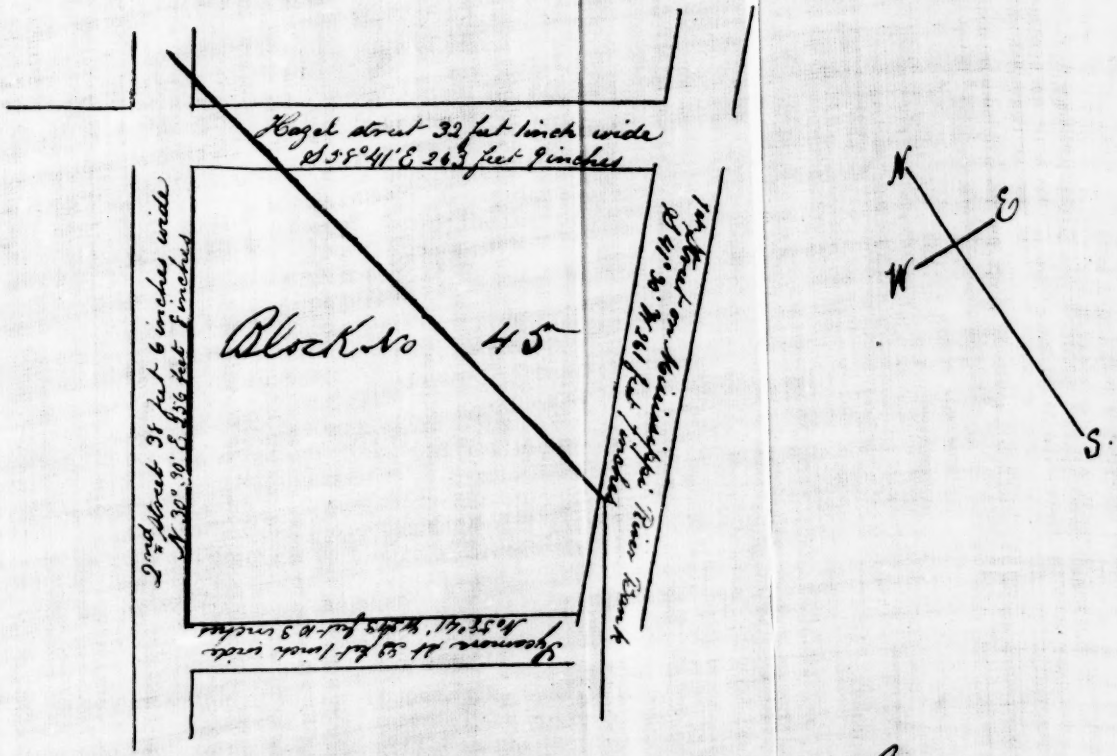
No. 297

St Louis Pub. Schools
vs
Fritz et ab

page 55.



No 297 { St Louis Pub School vs Fritz et al } Page 57



Variation 8° East = Scale of 100 feet to an inch

OFFCE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSSOURI,
Saint Louis, Nov. 19th, 1860.

The above plat and description of survey No. 38, of Saint Louis city lands are correctly copied from page 65, of records of St. Louis lands on file in this office.

JNO. LOUGHBOROUGH.
Surveyor General.

60 The plaintiffs then read in evidence. United States survey No. 394, of Saint Louis lands, to Charles Levelle, and the confirmation to Charles Levelle's representatives of the land therein surveyed, in words and figures as follows, to wit:

Survey No. 394, *of Saint Louis lands.—Survey No.* 394.

Plat and description of the survey of a lot of ground situate in block No. 44, of the town (now city) of Saint Louis, in township 45, north of the base line, range 7 east of the 5th pl. m., in the State of Missouri, executed by Joseph Indest, deputy surveyor, on the 27 and 28 August, 1855, under instructions from the surveyor general for Illinois and Missouri, dated the 18th of the same month and year. This being the lot of 60 by 150 French feet, conceded to Charles Lebelle, on the 1st March, 1788, by Manuel Perez, lieutenant governor of Upper Louisiana, (see Livre Terrien, No. 4, page 20) and in conformity with the opinion of Frederick Bates, U. S. recorder of land-titles for Missouri, which was given in favor of this claim, in his report to the Commissioner of the General Land Office, dated 2d February, 1816; it was con-
61 firmed to Charles Levelle's representatives by the act of Congress of the 29th April, 1816, entitled "An act for the confirmation of certain claims to land in the western district of the State of Louisiana, an in the Territory of Missouri." See Am. State papers, vol. 3, page 280, Duff Green's addition, and U. S. Statues at Large, vol. 3, p. 328, Little & Brown's edition.

Note: In relation to the interference of survey No. 395, with this survey—see the statement at the the end of the following description.

[Here follows maps marked page 61.] See over for plat.

62 *Description.*

Beginning at a point on the pavement of the side-walk on the S. E. edge of Second street, the northern corner of this survey, and of a lot confirmed to Joseph Navalez, under Francois Leveille, N. 395; 128 feet 9 inches south 30° 30′ west from the northern corner of block N. 44; thence S. 30° 36′ W. with the S. E edge of Second street and the N. W. boundary of this survey at 32 feet 2 inches, the western corner of the Navalez lot, 64 feet 4 inches to a point on the pavement, the western corner of the survey; thence S. 58° 48′ E. with the S. W. boundary of this survey, one hundred sixty feet and five inches to the southern corner of this

survey; thence N. 30° 30′ east with the S. E. boundary of this survey at 32 feet 4 inches, intersecting the S. W. line of the Navalez's lot, 64 feet 8½ inches to the eastern corner of this survey, and the western corner of a lot confirmed to Louis Ride's representatives survey N. 393; thence N. 58° 56′ W. with the N. E. boundary of this survey, one hundred and sixty feet and nine inches to the beginning corner.

Statement relative to the interference of survey No. 395, with survey N. 394=survey 395. This covers a confirmation by the act of
13th June, 1812, which was returned to the surveyor general,
63 as made to Joseph Navalez, under Francois Leveille's having
been claimed and proven up before Recorder Hunt, on the 19th April 1825, under the act of 26th May, 1824. In Hunt's minutes book 1, p. 114, it is entered as follows: "Joseph Navalles, as deriving title from Francois Leveille, claims a lot in the town of Saint Louis. being a part of square No. 44, containing 30 feet in front by 120 in depth, bounded on the east by the Mississippi, having a road between it and the lot, west by Church street, north by the other half of the square, and south by the lot claimed by Shackford.

Louis Cailloux being duly sworn, says that it is upwards of twenty-five years since this lot was fenced in and had a house on it, which was owned by a free negress named Francois Levielle, and that she continued to occupy the same until about three years ago; she sold it to Lougtems, being part of the same lot she has always owned for about 30 years."

Then taking into consideration all the facts recited in the foregoing it appears to be evident that the confirmation to Navalez under Levielle (or Levelle) is intended for the northern half of the same ground which was originally granted to Charles Lebelle (or Levelle) and confirmed to his representatives.

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
St. Louis, Sept. 14, 1855.

Survey No. 394 of the series of the Saint Louis lands, as plat-
64 ted and described in the foregoing record, has been examined,
and is hereby approved.

JNO. LOUGHBOROUGH,
Surveyor General.

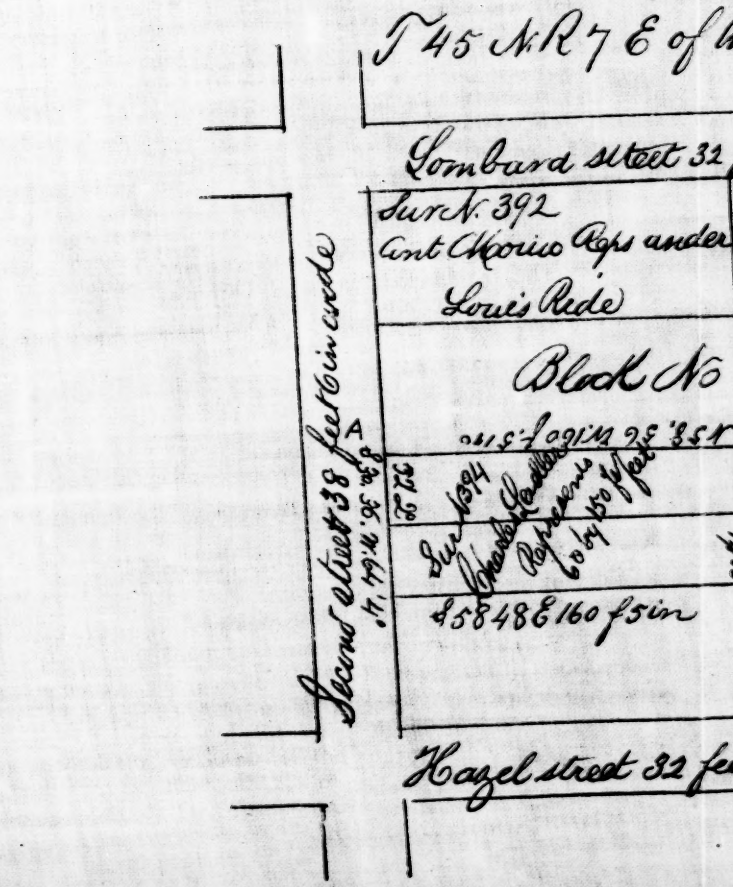
A plat and transcript of the foregoing record of survey, No. 394, was returned to the recorder of land titles on the 11th March, 1857.

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
Saint Louis, 2nd September, 1857.

The foregoing plat and transcript of survey, N. 394, of Saint Louis lands, and the certificate of the approval thereof, are correctly copied from pages 255 and 256 of the record book of surveys, in Saint Louis lands, on file in this office.

JNO. LOUGHBOROUGH,
Surveyor General.

No. 292 { St. Louis Pub. Schools vs. Fritz et al.



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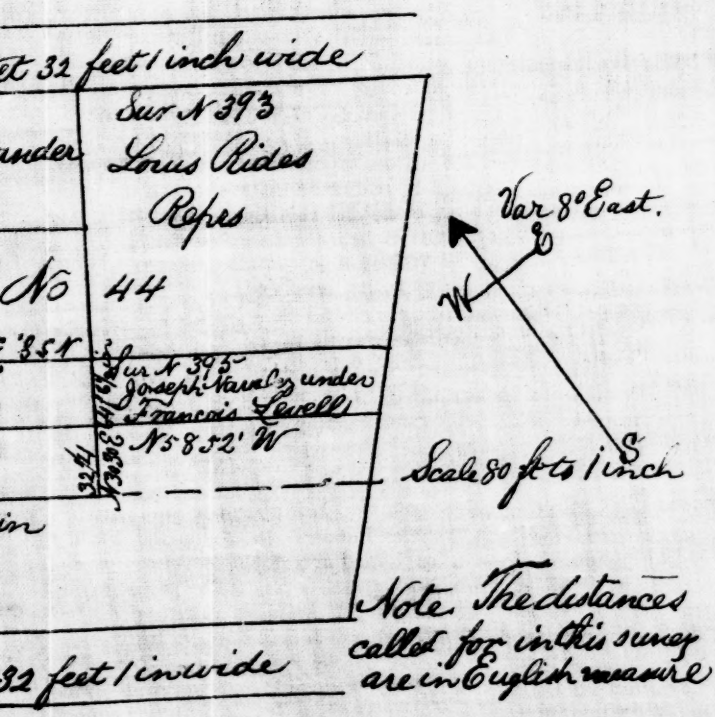


The plaintiffs then read in evidence the concession, confirmation, and survey to Louis Ride, or his representatives, being survey No. 393, in block 44, in the town of St. Louis, and the concession and confirmation alluded to in said survey, in words and figures, as follows, to wit:

Concession, confirmation, and survey to Louis Ride.

Nous, Don Fernando de Leyba, capitaine du regiment d' infanterie de la Louisiane, commandant-en-chef et lieutenant gouverneur de la partie occidentale des Illinois.

65 Sur la demande qui nous a ete faite par Louis Ride, suivant sa requete du 14 de ce mois expositive qu'au moyen du partage qu'il a fait avec ses enfans, il ne lui reste que soixante pieds de terrain de large sur 150 de long; que cette petite quantite de terrain n'est pas suffisante pour pouvoir faire les batimens, necessaires a un habitant, ce que le gene extremement n'ayant aucine commodite comme il se trouve derriere le terrain qui lui reste, et derriere celui tombe au lot de ses enfans un morceau de terrain vide que appartient au Domaine du Roi et qui n'a jamais ete occupe par personne, qui peut contenir quatre-vingts pieds sur cent vingt de large qui tient par un bout au terrain tombe en partage a ses enfans et a celui tombe au suppliant, et par l'autre bout aux ecores du Missippi, d'un cote a une rue de traverse qui limite le terrain d'amable Guyon et de l'autre cote du terrain de Martigny il vous supplie, Monsieur, de lui accorder soixante pieds de long prenant depuis les deux terrains partages avec ses enfans jusqu'au chemin qu'il laissera au bord du Mississippi qui se trouve encore avoir vingt-cinq pieds de large, et la largeur depuis la rue de traverse qui separe le terrain au dit Guyon jusqu'au terrain du Sr. Martigny qui contient 150 pieds de large, afin de pouvoir construire les batimens necessaires a un habitant pour y loger son grain et fourrage. En consequence, pour

66 favoriser le dit Louis Ride dans son etablissement, Nous lui avons concede et concedons a titre de propriete pour lui ou ses ayant cause, le terrain cidessus demande de toute sa grandeur et largeur, tel qu'il est explique en sa dite requete pour en jouir, faire, et disposer par le dit Louis Ride comme de chose a lui appartenante aux conditions de l'etablir dans l'an et jour, qu'il sera sujet aux charges publiques et autres qu'il plaira a sa Majeste d'y imposer. Donne a.

St. Louis, le 15th Avril, 1779.

FERNANDO DE LEYBA.

(See Livre tenier, No. 3, pages 23 et 24.)

Conf'd.—O. S.

Minutes of the recorder of land titles, acting as commissioner under the act of Congress, entitled. An act making further provision for settling the claims to land in the Territory of Missouri, passed the 13th day of June, 1812, and other acts subsequently passed.

January 2nd, 1814.

FREDERICK BATES, *Commissioner*.

Louis Ride, claiming a lot, Saint Louis vacancy, between said Ride and the river Mississippi, N. 3, p. 20.

August Chouteau says that this lot has been inhabited and cultivated from 1780 to this time.

(See Bates' Minutes, pages 1 et 151.)

67 A.

Opinions of the recorder of land titles for Missouri Territory as to claims entered under act of 13 June, 1812, and proven before 1st January, 1814, as provided by the act of the 3rd of March, 1813. Comprehending also, the claims in the late districtof Arkansas, which by act of the 2nd August, 1813, were permitted to be entered until 1st January, 1814, and proven until 1st July, 1814, together with the extensions of quantity provided by 4th section of the act of 3rd March, 1813, and confirmations under the act of 12th April, 1814.

Warrant or order of survey, Prov. land book 3, p. 23; survey not platted; notice to the recorder, by whom Louis Rides, reps; quantity claimed, vacancy between cl't. and river; where situated, F. 187 lot, in St. Louis; poss'n, inhab'n and cultivat., poss. and inhab. prior to 1803; opinions of the recorder, conf. sav'g the com's right to River street; order of survey.

RECORDER'S OFFICE, *St. Louis, December*, 1856.

The above is correctly transcribed from pages 1 and 9 of book No. 1, being one of the five small books in this office, with the following endorsement on the first and also on the fifth book, believed to be in the hand-writing of Frederick Bates, to wit: These five small books are originals in the proper handwriting of the undersigned, being his decisions on land claims since the adjournment of the late board. They were arranged and fairly transcribed for report to the commissioner of the General Land Office but not yet recorded in the books, because they have no authority till sanctioned by government.

St. Louis, November 1st, 1815.

FREDERICK BATES,
Recorder of land titles.
ADOLPHE RENARD,
U. S. Recorder Land Titles in the State of Missouri.

68 RECORDER'S OFFICE, *Saint Louis*, 14 *January*, 1857.

I certify that the foregoing is, with the attached paper marked A, a full and correct copy of the claim of Louis Reed's representatives to a lot of ground in the city of Saint Louis from the books and records in this office.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

Translation of the foregoing grant.

We, Fernando de Leyva, captain in the regiment of infantry of Louisiana, commander-in-chief and lieutenant governor of the western part of Illinois, upon the demand to us made by Louis Ride, in his petition of the 14th of this month, stating that on account of the division he made with his children, there now remains to him but sixty feet of ground in width by one hundred and fifty in depth that this small quantity of ground is insufficient to enable him to erect the buildings necessary to an inhabitant, which is prejudicial to him, as he enjoys no convenience. As there is on the rear of the lot remaining to him, and the lot that fell to his children, a space of vacant land which be-
69 longs to the Kings domain, and has never been occupied by any body, containing about eighty feet by one hundred and twenty in width, bounded at one end by the lot fallen to his children, and the lot kept by him at the other end by the ecore of the Mississippi, on one side by a cross street which limits the lot of Amable Guyon, and on the other side by the ground of Martigney, he supplicates you, sir, to be pleased to grant to him sixty feet in depth, to be taken from the two lots divided with his children, to the road, which he shall leave on the bank (au bord) of the Mississippi, which road shall still be twenty-five feet wide, and the width from the cross streets bounding the lot of said Guyon to the lot of Mr. Martigny, containing said width one hundred and fifty feet, in order to be able to raise the building necessary to a cultivator to lay up his grain and hay. Therefore, willing to aid the said Louis Ride in his establishment, we have conceded, and we do concede to him, or his assigns, in fee simple, the ground above asked for, in all its depth and width, as the same is detailed in his petition, in order that the said Louis Ride may depose of it as a thing to him belonging, under the conditions to improve it within one year and one day, and that it shall remain subject to the public and other charges which it might
70 please his majesty to decree.

ST. LOUIS, 14*th January*, 1857.

Given at Saint Louis, the 15 of April, 1779.

FERNANDO DE LEVA.

Truly translated.

ADOLPHE BENARD.

Survey No. 393 *of Saint Louis Lands.—Survey No.* 393.

Plat and description of the survey of a lot of ground situated in block No. 44, of the town (now city) of Saint Louis, in township 45, north of the base line range 7 east of the 5th principal meridian, in the State of Missouri, executed by Joseph Inderst on the 27 and 28 August, 1855, under instructions from the surveyor general for Illinois and Missouri, dated the 18th day of the same month and year.

This being the lot of 60 by 120 French feet, conceded to Louis Ride, on the 15 April, 1779, by Fern'd de Leyba, Lieutenant Gover-

nor of Upper Louisiana, (see Livre Serrien N. 3, p. 23,) and in conformity with the opinion of Frederick Bates, U. S. recorder of land titles for Missouri, which was given in favor of this claim in his report to the Commissioner of the General Land Office, dated the 2nd February 1816, it was confirmed to Louis Ride representatives, by the act of Congress of the 29 April, 1816, entitled "An act for the confirmation of certain claims to land in the western district of
71 the State of Louisiana, and in the Territory of Missouri.

(See Am. State papers, vol. 3, p. 280; Duff Green's edition, and U. S. Statutes at Large, vol. 3, p. 328, Little and Brown's edition.)

[Here follows map, marked page 71.]

Description.

Beginning at the stake set on the S.W. edge of Lombard street, 160 feet 5 inches S. 59° 11 E. from the northern corner of block No. 44, the northern corner of this survey and the eastern
72 corner of the lot confirmed to the representatives of Antoina Morin under Louis Ride, survey No. 392; thence S. 59° 11′ E. with the southwestern edge of Lombard street, the north eastern boundary of this survey 160 feet 5 inches to a stake, the E. corner of this survey, and of the block as surveyed by Joseph C. Brown, under his contract with the surveyor general, of the 15 September, 1835, from which the present eastern corner of the block, on the north-western edge of Main or First Street, as recently established by the authorities of the city of Saint Louis bears S. 59° 11′ E. distant 104 feet 1 inch; thence S. 41° 30′ W. with the south east boundary of this survey, and of the block as surveyed by Joseph C. Brown, 132 feet 3 inches to a stake, the S. corner of this survey and the eastern corner of a lot confirmed to Joseph Navalez under Francois Laveille's survey No. 395; thence N. 58° 56 W. with the south W. boundary of the survey and the N.E. boundary of the Navalez lot, 135 feet to a stake, the western corner of this survey and the eastern corner of this lot, confirmed to Charles Levelle's representatives, survey No. 304; thence N. 30° 30′ East with the north western boundary of this survey 129 feet 5 inches, to the beginning corner.

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI.
Saint Louis, September 13th, 1855.

Survey No. 393 of the series of Saint Louis lands as platted and described in the foregoing record, has been examined, and is hereby approved.

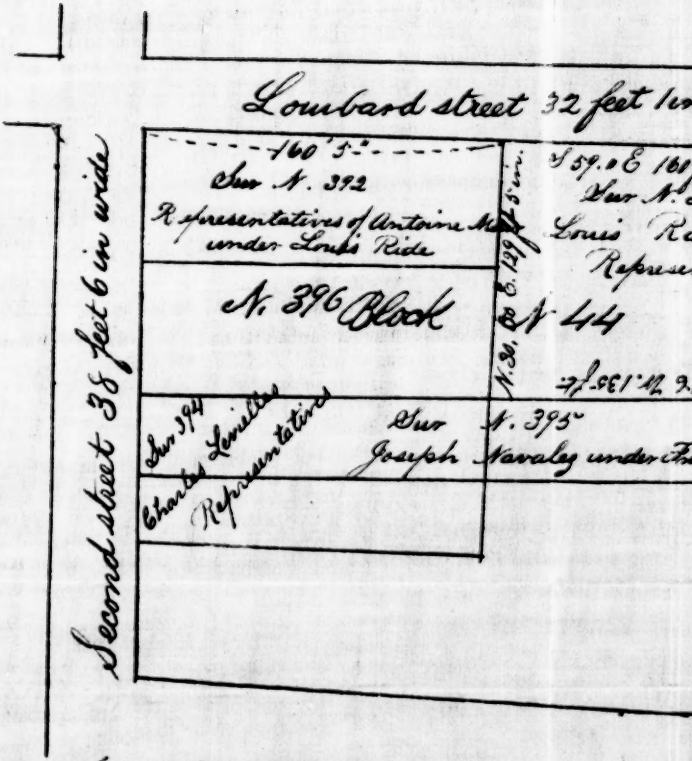
JNO. LOUGHBOROUGH,
Surveyor-general.

73 OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI.
Saint Louis, 2nd September, 1857.

The foregoing plat and transcript of survey No. 393 of the Saint Louis lands, and the certificate of the approval thereof, as platted

No. 297 { St Lou
Pub Sch
vs:
Fritz v

T. 45 N R 7 E. of
City of



Note. The distances called for in this

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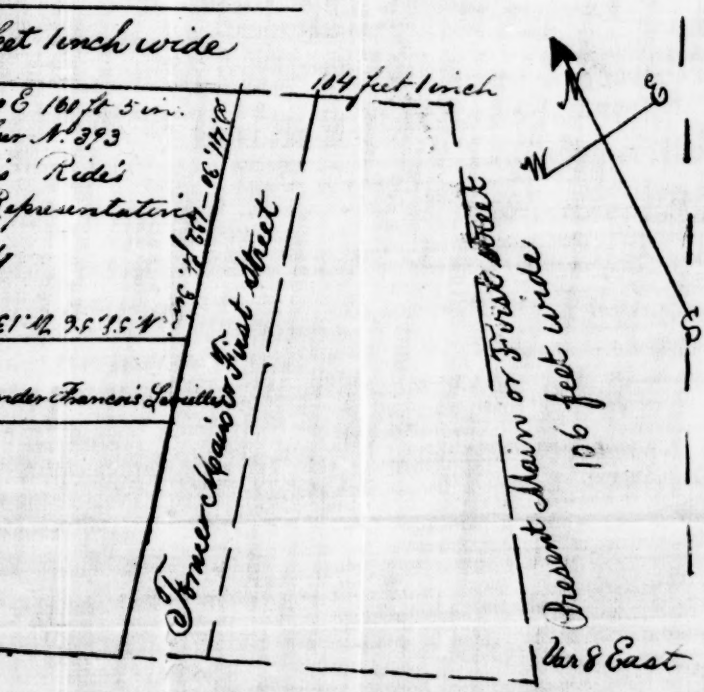
page 71

of the 5th pl ma
of Saint Louis.



this survey are in English measure. Scale of 10 feet to an inch

and transcribed on pages 253 and 254 of the record book of Saint Louis lands surveys, are correctly copied from said book on file in this office.

JNO. LOUGHBOROUGH,
Surveyor General.

The plaintiff then read in evidence a deed from the widow Francoise Levelle, (a free negress,) dated February 24th, 1825, to Pierre Loughtain, in words and figures as follows, to wit:

74 *Deed from Francoise Leveille.*

Sachent tous ceux qui ces presentes verront, que moi, Vve Francoise Leveille, negress libre, demeurant en la cite et comte de St. Louis, Etat du Missouri, pour prix et en consideration de la somme de quatre cents piastres qui m'a ete bien et duement payee avant la signature et la livraison des presentes, amte que je le reconnais, dont quittance et decharge, j'ai aujourd'hui vendu, cede, quitte, delaisse, abandonne, et transporte comme defait et par ce presentes je vends, cede, quitte, delaisse, abandonne, et transporte a Pierre Douglain de qui j'ai recu la susdite somme, un certain lot ou morceau de terre sus et situe en la cite cydessus et contenant trente pieds mesure francaise, faisant front au Mississippi, sur cent vingt pieds meme mesure, en allant vers l'ouest; le dit terrain cy-dessus vendu borne du cote de l'est par un chemin qui le separe du Mississippi; tenant du cote du nord au lot de fere Francois Tayon, et au cote de l'ouest et du sud au terrain au lot par moi reserve, lequel terrain m'appartient par concession, ainsi qu'il parait par les livres terriens pour une plus grande quantite, promettant garantir et preserver la quantite cy-dessus vendu de tous troubles, dons, dettes, douaire, et hypotheques, evictions, substitutions, et de tout autre empechement generalement quelconques pour par le dit Pierre Lougtain, ses hoirs ou ayant
75 causes, enjouir, faire, et disposer a suer gre et volonte comme de choses a eux propre et appartenante des maintenant et a toujours avec tous les droits et privileges qui y appartiennent et peuvent appartenir. En foi de quoi j'ai signe, scelle, et delivre ces presentes a St. Louis, ce vingt-quatre Fevrier de l'annee de notre Seignieur mil huit cent vingt-cinq.

[L. S.] marque de la VE + LEVEILLE.

Signe, scelle, & delivre en presence de temoin:
JOHN B. HORTEZ.
CLEMENT B. PENROSE.

STATE OF MISSOURI, *County and Township of St. Louis, sct:*

On this 19th of March, 1825, personally appeared before me the subscriber, a justice of the peace for said township, Ve. Leveille, whose mark is made to the above instrument of writing, and acknowl-

edged the above instrument of writing to be her act and deed, and desired that the same might be recorded as such; and the oath of John B. Hortiz being taken, who is to me personally known, he declared that he was personally knowing that said Ve. Leveille, who made her mark, was actually the identical Ve. Leveille.

In testimony whereof, I here set my hand, the day and year above written.

CLEMENT B. PENROSE,
Justice of the Peace.

Note. The above instrument of writing was filed for record
76 March 21st, 1825. Recorded 26th July, 1827.
ARCH. GAMBLE, *Recorder.*

Translation.

Know all men by these presents, that I, widow Francoise Leveille, a free negresse, residing in the city and county of Saint Louis, State of Missouri, for the price, and in consideration of, the sum of eighty dollars, which has been well and duly paid me before the signing and delivering of these presents, as I do acknowledge, for which there is a receipt and discharge, I have, this day, sold, ceded, relinquished, surrendered, abandoned, and transferred, as in part and by these presents, I sell, cede, relinquish, surrender, abandon, and transfer to Pierre Lougtain, from whom I received the above said sum, of certain lot or parcel of land lying and being situated in the city aforesaid, and containing thirty feet French measure, in front on the Mississippi, by one hundred and twenty feet, same measure, going westwardly; the said lot hereinabove sold, bounded on the east by a road which separates it from the Mississippi, adjoining on the north of the lot of Francois Tayon, deceased, and on the west and south the ground or lot reserved by me, which lot belongs to me by concession as it appears by the books terriens, of a larger tract,
77 promissing to warrant and defend the quantity hereinabove sold against all molestation, gifts, debts, dowers, and mortgages, ejectments, entails, and all other incumbrances generally whatsoever, for him, the said Pierre Lougtain, his heirs, or legal representatives, to have, manage and dispose of, at their will and pleasure, as property belonging to them, in their one right, now and forever, with all the rights and privileges hereunto belonging or to belong.

In testimony whereof, I have signed, sealed, and delivered these presents, at Saint Louis, this twenty-fourth day February, in the year of our Lord eighteen hundred and twenty-five.

[L. S.] mark ×LEVEILE.
of the widow.

Signed, sealed, and delivered in presence of witnesses:
JOHN B. HORTEZ.
CLEMENT B. PENROSE.

STATE OF MISSOURI, *County of Saint Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Ve. Francoise Leveille to Pierre Laugtain, the certificate of acknowledgment, the dates of filing and recording, and also of the translation thereof as fully as the same remains of record in my office in book N, page 474.

Witness my hand and official seal this 19th day of Nov. 1860.

C. KEEMLE, *Recorder.*
Per J. CONRAD, *D'y.*

78 The plaintiff then read in evidence an abstract or list from the office of the United States recorder of land titles of lands fronting on the river or tow-path or passway in front of the old town of Saint Louis, in words and figures following, to wit :

List of lands fronting on tow-path.

Block 1. No. 322 Ferguson, S. T. No. 1 I, 32 by the shore of the river. (Aux Ecors du Mississippi.)

Block 1, No. 302 Rogers, rec'd b'k F, p. 38, bounded in the rear by the Mississippi.

Block 2, No. 96 Lebeau, Hunt's b'k No. 2, p. 167, east by Front street.

Block 2, No. 96 Carr, Hunt's list 604, east by Front street.

Block 3, No. 95 Hebert, Hunt's b'k, No. 3 p. 48, east by Front street or the Mississippi.

Block 3, No. 387 Carr, rec'd b'k F, p. 70, to Mississippi, leaving space for a tow. (Bates decis. p. 1, front and bank of river.)

Block 4, No. 83 Thebaut, Hunt's No. 2, p. 48, east by Front street or the Mississippi, leaving a tow between lot and river.

Block 4, No. 81 Sutton, Hunt's No. 2, p. 83, between lot and river.

Block 4, No. 82 Clark, Hunt's No. 2, p. 35, between lot and river.

Block 4, No. 84 Lardoire, Hunt's No. 2, p. 125, east by Front street.

Block 5, No. 88 Le Roy, S. T. No. 4, p. 8, bounded by the shore of the Mississippi (ecors.)

Block 5, No. 86 La Berge, Hunt's No. 3, p. 56, east by Front street or Mississippi, leaving space for a tow.

Block 5, No. 85 Danyre, Hunt's No. 2, p. 9. leaving a space for tow.

Block 6, No. 91 Robidaux, Hunt's No. 3, p. 63, leaving a space for a tow.

79 Block 6, No. 90 Chouteau, Hunt's No. 1, p. 104, east by Front street or the river Mississippi, allowing a road for a cart between it and the river.

Block 7, No. 93 Chouteau, Hunt's No. 1, p. 103, east by Front street or the river Mississippi, allowing a road for a cart between it and the river.

...ael

Block 7, No. 94 city, Hunt's No. 3, p. 58, Front street or Mississippi, leaving a space for a tow.

Block 8, No. 99 Pratte, Hunt's No. 1, p. 172, east by Front street.

Block 8, No. 101 Trudeau, Hunt's No. 1, p. 106, Front street or Mississippi, leaving space for a tow.

Block 8, No. 102 Hunt's Trudeau, No. 1, p. 106, east by Front street.

Block 9, No. 104, Labbadie, Hunt's No. 2, p. 170, east by Front street.

Block 9, No. 105 Clark, Hunt's No. 2, p. 31, east by Front street, which separates it from the Mississippi.

Block 10, No. 106 Bonis, Hunt's No. 2, p. 1, east by Front street.

Block 10, No. 107 Clark, Hunt's No. 2, p. 31, east by the Mississippi, leaving a space for a tow, or the street called Front street.

Block 10, No. 108 Brazeau, Hunt's No. 2, p. 40, running to the Mississippi, leaving a tow, or to Front street.

Block 10, No. 110 Brazeau, Hunt's No. 2, p. 166, fronting on Front street or the Mississippi.

Block 11, No. 111 Paul, Hunt's No. 1, p. 177, east by Front street.

Block 11, No. 326 Loisel, Hunt's No. 3, p. 71, front or street on the Mississippi, leaving space for a tow.

Block 12, No. 112 Landreville, Hunt's No. 1, p. 107, east by Front street or the Mississippi, leaving a road between it and the lot.

Block, 12, No. 124 Clark, Hunt's No. 2, p. 32, east by
80 Front street which separates it from the Mississippi.

Block 13, No. 308 Chouteau, Hunt's No. 1, p. 172, east by the Mississippi, or Front street, leaving a tow between this lot and the river.

Block 14, No. 117 Philibut, Hunt's No. 1, p. 175, east by Front street.

Block 14, No. 116 Cabanna, Hunt's No. 1, p. 176, east by Front street.

Block 14, No. 115 Berthold, Hunt's No. 1, p. 173, east by Front street.

Block 15, S. T. No. 1, p. 11 to the shore (aux ecros) of the Mississippi.

Block 16, S. T. No. 3, p. 16 fronting on the river Mississippi, (fronte al riv Mississippi.)

Block 17, No. 382, Lachaisse rec'd b'k 6, p. 445, undetermined.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
Saint Louis, March 15th, 1864.

I certify that the foregoing list is truly extracted from the books and records on file in this office.

THOMAS NELSON,
U. S. Recorder of Land Titles.

David Adams, witness, recalled.

The defendant then recalled David Adams, who testified that he remembered Main street as far back as 1805, and that then, and for more than twenty-five years afterwards, indeed until after 1844, Main street, if extended below Plum, would have run into the river. Below Plum street there was no Main street, only a very small path, sometimes not so broad as your hand.

R. Dowling, witness, recalled.

He also recalled Richard Dowling, who testified that earliest
81 recollection of this lot in controversy was in 1817. At that time there was no Main street below Plum, only a very narrow path, scarcely wide enough for a foot passenger, before this lot. The inhabitants of the lots then claimed to the river, and their enclosures went to the river.

On cross-examination he said he claimed a lot in the block below the lot in controversy. In 1858 and 1859, McCasseberry said it belonged to the schools. He asked Mr. Casseberry to bring suit at once. Mr. Casselberry replied he would wait a little and then sue. He (Dowling understood it to be Casselberry's intention to wait until some old witnesses were dead, whereupon he perpetuated their testimony, and suit has not been brought yet.

The foregoing is all of the evidence offered by either party.

The plaintiffs then asked the court to give the following instructions to the jury, which the court gave accordingly, to wit:

Instructions given for plaintiff.

The eastern boundary line of the corporation of St. Louis, of 1809, read in evidence, and the eastern line of the out-boundary of December the 8th, 1840, read in evidence, both extend to the eastern
82 boundary of the State of Missouri, which is the middle of the main channel of the Mississippi river.

2. The defendant in this case, has set up no title in himself or those whom he represents, or under whom he claims, but seeks to maintain his possession as a mere intruder, by setting up a tittle in third persons with whom he has no privity. In such a case it is incumbent upon the party setting up the defence to establish the existence of such an outstanding title beyond all controversy. It is not sufficient for him to show that there may possibly be such a title. If he leaves it in doubt that is enough for the plaintiff. Where the plaintiff has a prima facia good title he has a right to rely on such title, and is not bound to furnish any evidence to assist the defence. It is not incumbent on him negatively to establish the non-existence of such an outstanding title; but it is the duty of the defendant to make its existence certain.—Given.

The plaintiff then asked the court to give the following instructions to the jury, which the court refused to give, and the plaintiffs at the time excepted to the decision of the court in refusing to give the same, to wit.

83 *Instructions asked for by plaintiff and refused.*

1. If the jury believe from the evidence, that in accordance with the plan of the town of Saint Louis, as laid out in 1764, there was between the front row of lots and the river a space of ground left for a street, road, tow path, or levee, or dedicated to any other use common to the inhabitants thereof or the public, then said lots are not reparian, and not entitled to alluvion.

2. The jury are instructed to disregard all parol evidence tending to establish a boundary of a lot varying from that of the other lots in the same tier, if they are satisfied from all the evidence in the cause that such uniformity was a part of the plan of the Spanish town of Saint Louis.—Referred.

3. If the jury believe that block 44, to which the land in controversy is claimed as an accession through alluvion, was by the U. S. surveys in 1835 surrounded on all sides by streets, and said surveys have stood from that time to the present as the approved surveys of the town, without appeal the owners of the lots thus surveyed are estopped from claiming any ground beyond the street which is by such survey made its eastern boundary.—Refused.

4. The call for the river on the eastern boundary of the
84 lot of Levielle, in the original concession of the lieu. governor, is not conclusive evidence that the lot is riparian, but if the jury believe from the maps and plans in evidence, and all the evidence in the case, that the Spanish authorities intended to leave a space between the tier of lots, of which block 44 is one, and the river for continuation of Main street or Front street, or for any other public purposes, said call will be disregarded.—Refused.

5. The jury are instructed that, as a question of law, the owners of lots in the town of Saint Louis, as said town existed prior to December the 20th, 1803, have never had any riparian rights.—Refused.

6. If the jury believe from the evidence that there was a street, or tow-path, or passaway for the use of the public between the Mississippi river and the most eastern row of lots in the former town of St. Louis, as said town existed prior to December the 20th, 1803, then and in that case the owners or claimants of said lots are not riparian proprietors of the lands between said lots and the said river.—Refused.

7. If the jury believe from the evidence that prior to December 20th, 1803, there was a road or passway between the front
85 row of the lots in the former town of Saint Louis and the Mississippi river, that the river after that time washed away the land so that the western edge or bank thereof was west of said road or passway, and west of the eastern boundary line of said lots, and that afterwards the river receded, so that the present western or bank thereof is no father west than where it was prior to December the 20th, 1803, the owners of said lots are not entitled to riparian rights.—Refused.

8. The jury will find for the plaintiff if they believe from the evidence that all of the maps, plats, surveys, deeds, and other docu-

ments and instruments read in evidence by the plaintiff are genuine, and that the premises in controversy are within the boundaries of the corporation of 1809, read in evidence, and within the out-boundary of December the 8th, 1840, read in evidence, and also within the school assignment, being survey No. 400, read in evidence, and that the land described in the deed from the city of Saint Louis to the plaintiff, read in evidence, includes the land that is described in the petition of the plaintiff, and also that the land described in said petition is not within the boundaries of any land confirmed to any person or persons.—Refused.

9. If both the confirmations and the surveys of the United States to private individuals for the most eastern row of lots west of the premises in controversy, do not call for the Mississippi river
86 as a boundary, then the owners of said lots are not entitled to said premises as riparian proprietors.—Refused.

10. If the jury believe from the evidence that the defendants claim under a confirmation, and that the survey of such confirmation does not call for the river as a boundary, they are estopped by said survey, and cannot claim any right as a riparian proprietor.—Refused.

The defendants then asked the court to give the following instructions to the jury, to wit:

Instructions given for defendant.

1. The jury is further instructed that if they find from the evidence that there was, for the convenience of those who occupied the lot of Levellier and the adjoining neighbors and others, a road left along the front of it, between it and the river, and that when the river receded this road was moved further east, and when the river rose it was extended further west, and that the same was the case with the enclosure of Levellier, there is no presumption then arising against the ownership by Levielleir and those claiming under him up to the middle of the main channel of the river, subject to the easement of the public to use the river as a highway, and to cordel the boats used in navigating it by means of the road
87 above spoken of.

2. The jury is instructed that if they believe from the evidence that prior to and on the 20th December, 1803, a person named Levellier inhabited, cultivated, and possessed a lot of ground in the city of Saint Louis, bounded west by Second street, on the east by the river Mississippi, on the south by a line parallel to Hazel street, and near to it, on the north by another parallel line, and sixty feet distant from the first parallel; that Levellier claimed this lot as his own; that he continued on the same lot until his death, which occurred before 1812, but that his widow, claiming the same under him, continued to reside there until after 1812; that the west or right bank of the river was then nearer to Second street than it now is, and that the premises in controversy are included within Second street on the west, the Mississippi on the east, and the north and south lines of Levellier's possession extended to the bank of the river in its new position, then the plaintiff cannot recover, and the jury must find for the defendants.—Given.

3. The jury is instructed that the concession to Levellier, read in evidence, dated 1 March, 1788, is evidence of the extent of
88 his claim to the ground therein described, and evidence that he claimed to the Mississippi river.—Given.

4. The jury is further instructed that the first section of the act of 1812 confirmed the titles of the inhabitants of the town of Saint Louis to lots inhabited, cultivated, or possessed by them on the 20th December, 1803, according to their claims thereto.—Given.

5. The jury is further instructed that nothing done by any officer of the United States subsequently to the 13th June, 1812, has any effect to limit or impair any rights accruing to any individual under that act.—Given.

And the plaintiffs objected to the giving of said instructions which were asked for by the defendants, but the court overruled said objections, and gave the said instructions which were asked for by the defendants as aforesaid, and the plaintiffs at the time excepted to said acts and decisions of the court in overruling said last-mentioned objections, and in giving said last-mentioned instructions, which were asked for by the defendants.

Whereupon the jury returned a verdict for the defendants.
89 And the plaintiffs in due time, and within less than four days from the time of the trial herein, made a motion for a new trial, in words and figures as follows, to wit:

Motion for a new trial.

And the plaintiffs come and move the court to set aside the verdict of the jury in the above cause and grant a new trial, for the following reasons:

First. Because the court erred in not giving the instructions to the jury which were asked for by the plaintiffs and refused by the court.

Second. Because the court erred in giving to the instructions of the jury which were inconsistent with each other.

Third. Because the court erred in giving the instructions to the jury which were asked for by the defendants and given by the court.

Fourth. Because the verdict of the jury is contrary to evidence.

Fifth. Because the verdict of the jury is against both law and evidence.

Sixth. Because the verdict of the jury is contrary to the instructions of the court.

Seventh. Because the verdict of the jury is against the weight of evidence.

Eighth. Because the court erred in admitting evidence for
90 the defendants which ought to have been excluded.

Ninth. Because the court erred in excluding evidence offered by the plaintiffs which ought to have been admitted.

Tenth. Because the verdict of the jury is against law, and the court erred in declaring the law of this case.

Eleventh. Because the proceedings of the court and jury in the

trial of the above cause were, in many other respects too numerous to be particularly mentioned, contrary to law, evidence, and justice.

E. CASSELBERRY,
Att'y for the Plaintiffs.

And the court overruled said motion for a new trial, and the plaintiffs at the time excepted to the decission of the court in overruling said motion for a new trial.

And the plaintiffs tender this their bill of exceptions, and ask that the same be signed and sealed by the court and the judge thereof, and made a part of the record of this cause, which is done accordingly this 25th day of June, eighteen hundred and sixty-four.

[SEAL.] JAMES C. MOODY, *Judge.*

91 STATE OF MISSOURI, *County of Saint Louis, ss:*

I, Josiah Thornburgh, clerk of the Circuit Court, certify the foregoing to be a true and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remains of record in my office.

In testimony whereof, I hereto set my hand and affix seal of said court this 29th day of September, A. D. 1864.

[SEAL.] JOSIAH THORNBURGH, *Cl'k.*

[5-ct. stamp.]

And afterwards, to wit, at the October term, 1866, of the said Supreme Court, the following further proceedings were had in said cause, to wit.

MONDAY, *October* 15, 1866.

THE BOARD OF PRESIDENT AND DIRECTORS OF the St. Louis Public Schools, app'l't,
v.
GOTTFRIED SCHOENTHALER, resp'd't.

It is ordered by the court that this cause be laid over until after the 15th day of November next.

And afterwards, to wit, at the March term, 1867, of said
92 court, the following further proceedings were had in said cause, to wit:

TUESDAY, *March* 19, 1867.

BOARD OF PRESIDENT & DIRECTORS ST. LOUIS Public Schools, appellant,
vs.
MARY SCHOENTHALER *et al.*, respondent.

It is suggested, and shown to the satisfaction of the court, that since the last continuance of this cause, respondent, Mary Schoenthaler, hath intermarried with Charles Fritz; whereupon it is ordered by the court that the said husband of Mary Schoenthaler be

made a party to this suit. Thereupon the said Charles Fritz enters his appearance, and this cause is set for a hearing on the first day of April next.

And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

TUESDAY, *April 2nd*, 1867.

BOARD OF PRESIDENT AND DIRECTORS OF THE St. Louis Public Schools, appellants,
vs.
GOFTFRIED SCHOENTHALER, respondent.

Now again come the parties aforesaid, by their respective attorneys, and after argument herein, submit this cause to the court.

93 And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

FRIDAY, *April 6th*, 1867.

BOARD OF PRESIDENT & DIRECTORS OF THE ST. Louis Public Schools, appellants,
vs.
GOTTFRIED SCHOENTHALER, respondent.

Additional brief of respondent filed.

And aftewards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

MONDAY, *April 8th*, 1857.

BOARD OF PRESIDENT AND DIRECTORS OF THE ST. Louis Public Schools, appellants,
vs.
GOTTFRIED SCHOENTHALER *et al.*, respondent.

Statement and brief of appellant filed.

And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Circuit Court.

MONDAY, *April* 16, 1867.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE St. Louis Public Schools, appellants,
94 *vs.*
MARY FRITZ, CHAS. FRITZ, HER HUSBAND, and George Bayha, administrator of Gottfried Schoenthaler, deceased, respondents.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning

the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis Court be in all things affirmed and stand in full force and effect; and that the said respondents recover of the said appellants their costs and charges herein expended, and have execution therefor.

Opinion filed.

And afterwards, to wit, on the 24th day of April, 1867, said appellant appeared in court and filed their bond in said cause, which bond is in the words and figures following, to wit:

Know all men by these presents that we, the Board of President and Directors of the St. Louis Public Schools, as principal, and Julius Conrad and Charles F. Meyer, as securities, are held and
95 firmly bound into Mary Fritz, formerly Mary Schoenthaler, Chas. Fritz, her husband, and George Bayha, administrators of Gottfried Schoenthaler, in the sum of one thousand dollars, to be paid to the said Mary Schoenthaler and Gerge Bayha, administrators, as aforesaid, and to their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of April, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas lately, at the March term, 1867, of the Supreme Court of the State of Missouri, in a suit depending in said court between the Board of President and Directors of the St. Louis Public Schools, appellant, and Mary Schoenthaler and George Bayha, administrators of Gottlieb Schoenthaler, respondents, judgment was rendered against the said appellent; and the said Board of President and Directors of the St. Louis Public Schools having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a
96 citation directed to the said Mary Schoenthaler and George Bayha, administrators, as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Board of President and Directors of the St. Louis Public Schools shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

The Board of President and Directors of the St. Louis Public Schools.

[SEAL.] By S. D. BARLOW, *President.*
[SEAL.] CHAS. F. MEYER.
[SEAL.] JULIUS CONRAD.

Sealed and delivered in presence of—
GEO. B. KELLOGG.

On the back of which bond the following endorsement appears:

"This bond is deemed by the court sufficient, and the writ of error operates as a supersedeas in the case within named

DAVID WAGNER,
Chief Justice of the Supreme Court of Missouri.

97 STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the Supreme Court, held at St. Louis, of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain of record and on file in my office.

Witness my hand, with the seal of said court hereto affixed, at office, in the city of St. Louis, this 26th day of October, A. D. 1867.

[SEAL.] O. T. FISHBACK, *Clerk*,
Per E. P. McCARTY, *D'p.*

Costs of this transcript $47; paid by pl'ff in error.

Attest: O. T. FISHBACK, *C'k*,
Per E. P. McCARTY, *D'p.*

98 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the judges of the Supreme Court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court, before you, at the March term thereof, 1867, between the Board of President and Directors of the Saint Louis Public Schools, appellant, and Mary Fritz, formerly Mary Schoenthaler, and Charles Fritz, her husband, and George Bayha, administrator of Gottfried Schoenthaler, respondents, a manifest error hath happened, to the great damage of the said Board of President and Directors of the St. Louis Public Schools, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and sixty-seven.

Issued at office, in the city of St. Louis, with the seal of the Circuit Court of the United States for the district of Missouri, dated as aforesaid.

[SEAL.]

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri District.

[50-ct. revenue stamp.]

Allowed by—

DAVID WAGNER,
Presiding Judge Sup. Ct. Mo.

STATE OF MISSOURI, *ss* :

I, O. T. Fishback, clerk of the Supreme Court, held at St. Louis, of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States, at Washington, a full, true, and complete transcript of the record and proceedings, with all things concerning the same, in the within-entitled cause, as fully as the same remain of record and on file in my office.

In witness whereof, I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 26th day of October, A. D. 1567.

[SEAL.]

O. T. FISHBACK, *Clerk*,
Per E. P. McCARTY, *D'p.*

[5-cent revenue stamp.]

Endorsed: Writ of error. The Board of President and Directors of the St. Louis Public Schools *vs.* Mary Schoenthaler and George Bayha, administrator of Gottfried Schoenthaler. Filed April 24, 1867. O. T. Fishback, cl'k, per E. P. McCarty, dep.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 147. { THE ST. LOUIS PUBLIC SCHOOLS, *Pl'ff in Error*, vs. D. R. RISLEY AND OTHERS.

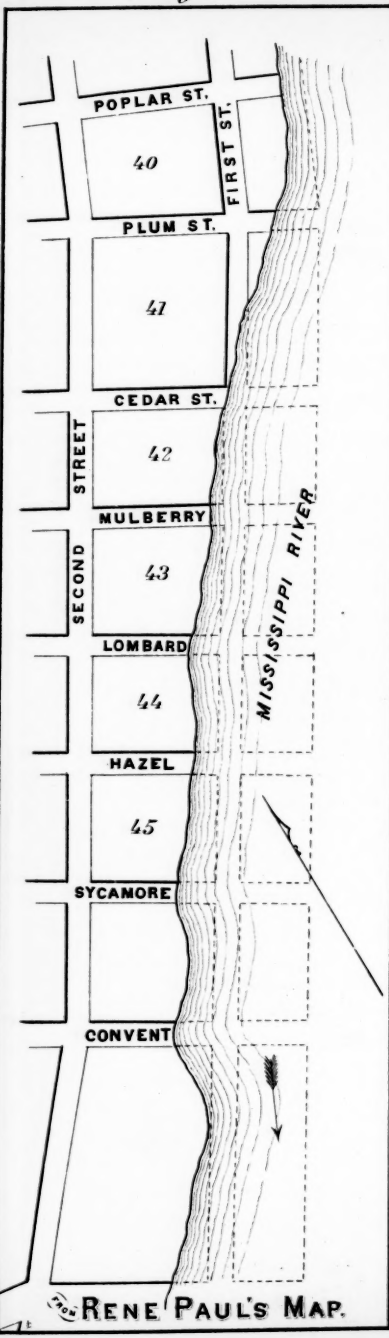
No. 148. { THE ST. LOUIS PUBLIC SCHOOLS, *Pl'ff in Error*, vs. MARY SCHOENTHALER AND OTHERS.

Brief for Plaintiff in Error.

M. BLAIR,
F. A. DICK,
For Plaintiff in Error.

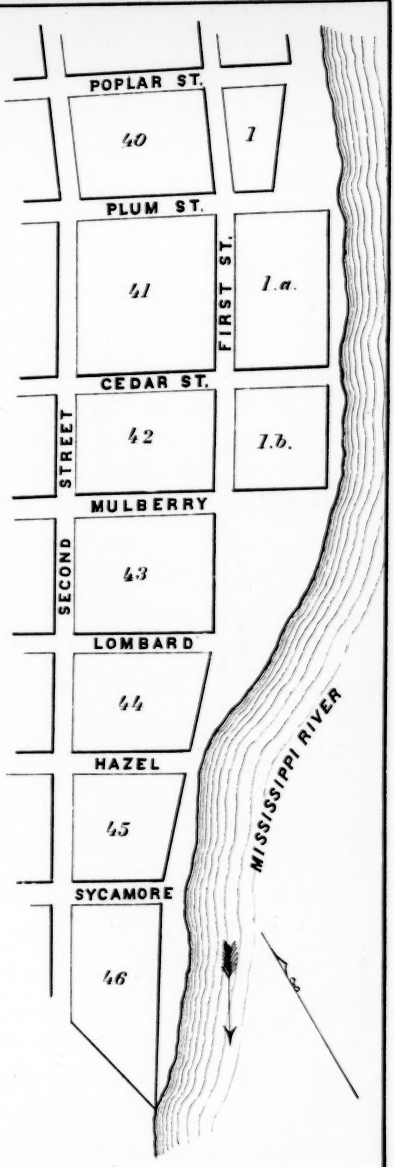
J. L. Pearson, Printer, corner 9th and D streets.

Fig. 1.



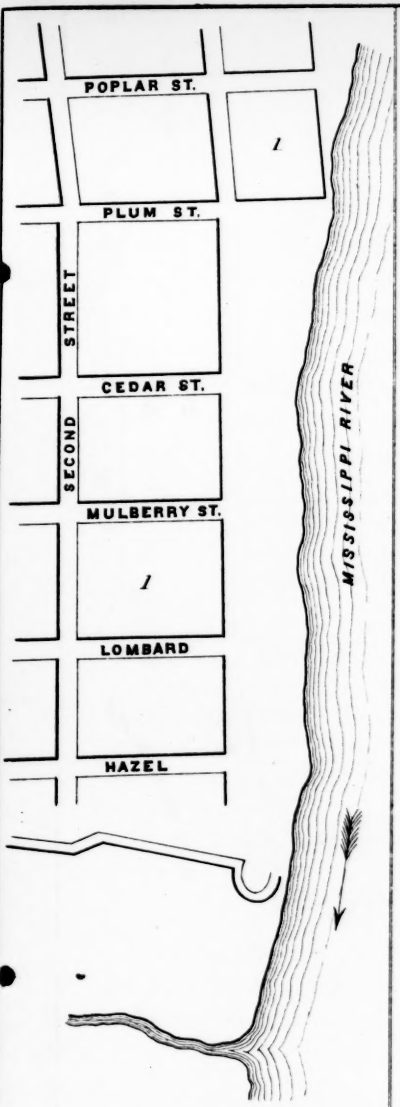
From RENE PAUL'S MAP.

Fig. 2.



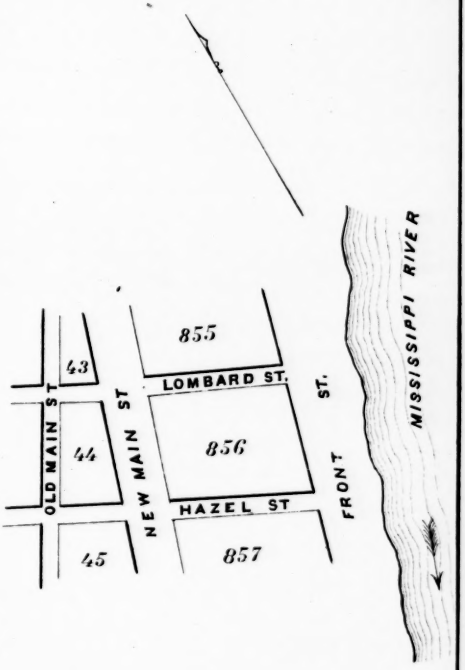
CONWAY'S MAP

Fig. 3.



CHOUTEAU'S MAP

Fig. 4.



Present Condition of the Property.

J.F. Feiney Lith. Washn. D.C.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 147. { THE ST. LOUIS PUBLIC SCHOOLS, *Pl'ff in Error*, vs. D. R. RISLEY AND OTHERS.

No. 148. { THE ST. LOUIS PUBLIC SCHOOLS, *Pl'ff in Error*, vs. MARY SCHOENTHALER, AND OTHERS.

Brief for Plaintiff in Error.

These are suits by the Public Schools brought in the state court to recover block No. 856 in the city of St. Louis; No. 147 for the northern 160 feet running from Main street east to Front street, bounded north by Lombard street; and No. 148, to recover a lot of sixty feet next, south of it.

The plaintiff gave in evidence assignments to it of this land as set out on page 12 of No. 147, and page 10 of No. 148, as public land reserved for the use of schools by the second section of the act of Congress of 13 June, 1812, 2 S., 748, and granted by acts of 26 May, 1824, 4 S., 52, and 27 January, 1831, 4 S., p. 435.

Judgment below was for the defendants, and the cases are here on writ of error under 25th section of the judiciary act.

The defendants claim title under section one of the same act of Congress of 13 June, 1812. The evidence shows that the entire block in question has been formed, since about the year 1844 by alluvial deposits; and that block

44, which lies back of No. 856, was prior to that time the front block facing the river; and that the river, prior to 1844, even encroached upon block 44, so that the eastern line of that block was submerged land, covered by water.

After 1844 the city of St. Louis constructed streets both sides of block 44, running into the river, and for a distance below this block, and after this the alluvial deposit became very rapid; so that while in 1844 there was no street actually above water east of second street, since then two streets east of second street have been laid out on new made ground, namely, Main street, bounding block 44 on the east, and block 856 on the west, and Front street, which bounds block 856 on the east; there is also now above water, caused by this alluvial deposit, a wharf to the east of Front street.

The plaintiff insists that, by the plan on which the old Spanish town was laid out, there was actually a margin of shore in front of the old Spanish block, which was reserved for public use as a landing and street, and that the title to this public land, by virtue of the treaty, vested in the United States on the cession of Louisiana, and therefore was not, by the act of 1812, vested in individual lot owners.

The defendants claim that their lots in the old Spanish town, in block 44, actually extended to the river, and were occupied by them to the water's edge, and that thereby the act of 1812 vested title to the main channel in the individual owners, by virtue of such possession, and that the accretion belongs to such individual owners.

The two cases being nearly similar are included in one statement. The defendants' titles were as follows:

In Risley's case, No. 147, which is for the northern 160 feet, bounded north by Lombard street, the defendant offered no *record* evidence of title in himself. His evidence was the testimony of witnesses to prove the possession of a lot prior to 20th December, 1803, under the 1st section of the act of 13th June, 1812, which lot, as

he contends, fronted on Second street, and extended eastwardly to the river, whatever that depth might be. This parol proof is on pages 19, 20, 21, 22.

The defendant also gave in evidence a concession to Charles Leveille for the lot adjoining his on the south, dated March 1, 1788, being for a lot 60 feet front by 150 in depth, bounded on one side by Louis Ride, on the other by the King's domain, on the rear by the Mississippi, and on the main front by Second street, (page 25;) also, Paul's plat and other evidence, stated on page 25, and from page 27 to page 44, tax receipts to show the extent of the lot.

This evidence was offered to show that the lot of defendant extended to the river.

The plaintiff, in support of the action of the public officers assigning the land to them, and to show that the lot, which was claimed by defendant as a town lot under the act of 1812, did not cross the eastern line of block 44 and extend to the river, gave evidence to prove that the town was laid out on an established plan, in which were designated blocks and lots of a uniform size, (designated in the act of 1812 as town lots,) streets, and public places, including a public street and landing, lying in front of the lot of defendant, in common with other river front lots, and which was its eastern boundary.

This evidence was first Chouteau's map of St. Louis, (page 45,) and the opinion of the supreme court of Missouri on said map, as set out page 44 of the Record, taken from 31 Mo. Reports, 112, page 44; next, United States surveys of blocks 43, 44, and 45 of St. Louis, (pages 24 to 27, No. 148,) embracing defendant's lot, (page 45,) and Conway's and Loughbrough's maps of the city as United States surveyor-general; also, the concession of Louis Ride to the north half of block 44, (set out on pages 30 and 32 of No. 148,) which is bounded east by a road along the Mississippi. The confirmation to Ride by recorder Bates in 1816, saving the coms' right to River

street, (page 30 of No. 148,) and United States survey of Ride's confirmation, extending 160 feet on Lombard street, that being the entire depth east from Second street, (p. 33 of No. 148.)

Next, abstract of all the confirmations and concessions in the old town of St. Louis, (see page 36 of No. 148,) and also abstract of confirmations and concessions in blocks 41, 42, 43, 44, 45, and plats of the towns of St. Charles and New Madrid. Next, depositions of Boli and Sanguinet, (pp. 45, 46, No. 147,) to show that in Spanish times there was a public way between the front lots and the river. The defendant also read documents, as stated on page 48, including United States survey No. 394 of lot on block 44, being the north half of the Leveille lot, fronting 32 feet on Second street by depth eastwardly of 160 feet, the same as Louis Ride's adjoining survey, which is called for, and in specifying the interferences, it speaks of the confirmation by proof before recorder Hunt, under act of 1812, to Navalez, under Leveille, for part of square No. 44, of 30 feet front by 120 deep, bounded east by the river, having a *road between it and the lot*, (pp. 28, 29, No. 148.)

The defendants, in reply to this rebutting evidence, introduced the documents set out on page 49 of No. 147, and the depositions of witnesses (pages 49 and 50.)

The court gave for plaintiff instructions, on page 50, 51, declaring that the eastern boundary of the town was the main channel of the river, and that a permanent street established between the river and the most eastern blocks would cut off riparian rights from lot owners in the blocks.

For the defendant the court instructed that the possession by Mrs. Charleville before 20 December, 1803, and up to 13 June, 1812, of a lot in block 44, bounded west by Second street, east by the river, north by Leveille, and south by Lombard street, would give her title to the same with the accretions (pp. 53, 54.)

The court refused to instruct the jury for the plaintiff as to the effect of evidence, but left the case to the jury on their construction of it.

Thus the court refused instruction, No. 4, page 52, asking that the plat of the town as first laid out was evidence against the lot owners. Instructions 5, 6 on page 52 were also as to the effect of record evidence.

The court refused to instruct the jury that the confirmations and surveys by the United States of the title under which defendant claimed, were evidence of extent and boundaries of his lot.

The court refused to give any effect in law to the plan of the town made by Chouteau, and to the confirmations and surveys by the United States of the lot in question, fixing the extent and boundaries of the lot, and treated the case as one to be left exclusively to the opinion of the jury on the weight of the parol evidence against the documentary evidence. Even the plaintiff's record title the court refused to treat in any other light.—(See No. 2, p. 51.)

No. 148.

Defendant opens case, p. 16, by concession of 1 March, 1788, to Leveille, of lot 60 feet front by 150 feet deep, bounded on one side by lot of Louis Ride's heirs, on the other by the King's domain, on its rear by the Mississippi river, and on its principal front by Second street.

Defendant next examines witnesses (Hortez, p. 17; Pourcelli, p. 18; Barada, p. 19; Adams, p. 20) to prove possession prior to 20th December, 1803. They put the lot back close to the river, with *fence* east side and *passway* along the river. Only one of these witnesses speaks of the lot as it was prior to 20th December, 1803.

Defendant closes with this parol proof.

P. 22.—Plaintiff, in rebuttal, introduced witnesses (Chi. Sanguinet, p. 22; Wm. Boly, p. 23) who proved road about 15 feet wide along east of the lot.

P. 24.—Chouteau's map and other maps, as stated, (p. 24,)—the same evidence stated in No. 147, as to plats and surveys.

P. 28.—Confirmation and survey by United States to Leveille, 60 by 150 feet, "to be surveyed." (This is copied in No. 147, p. 24.)

P. 28.—*Survey* of *north half* of this Leveille lot, which *north half* is 30 by 120, and leaves a *road* between river and lot.

(*Note.*—This survey is of *Navalez* lot $\frac{1}{2}$.)

Pp. 30 and 32.—Concession of 15th April, 1799, to Louis Ride—80 by 120 feet—leaving a road on the bank of the Mississippi of 25 feet wide.

P. 31.—Bates' confirmation to L. Ride, leaving the vacancy between the lot and the river, and "order of survey."

P. 32.—Survey No. 393, for Louis Ride, 160 *feet deep.*

Pp. 34, 35.—Deed of Leveille's widow to Fontaign for north half the land "bounded east by *road*, which separates it from river."

Pp. 36–7.—Concessions of all blocks along river.

Defendant, in rebuttal, to prove how river front was, gave evidence.—(p. 38.)

It thus appears that the evidence in the two cases is nearly identical. But there is this difference: In No. 148, Schoenthaler's case, for the southern lot, the defendant gave in evidence the *concession* to Leveille of March 1, 1788, set out.—(p. 16.)

The defendant gave no other documentary evidence of title than this unconfirmed concession.

The residue of defendant's proof of title was the recollection of one witness testifying as to the possession of the lot prior to 20th December, 1803.

On this concession, in No. 148, the case is by the instructions made to turn.—(pp. 38, 39, 40, 41.)

The court refused all the instructions asked by plaintiff as to the effect of the plan of the town as shown by

the documentary evidence, and as to the effect of plaintiff's assignment, and instructed that the concession of 1788 was evidence of a claim under the act of 1812, and also of the extent of such claim, and then declared, as a proposition of law, that the lot possessed was according to the claim.

It will thus be seen that in Schoenthaler's case, No. 148, for the southern lot, the court virtually decided the case in favor of the defendant on the mere strength of the Spanish concession; while in No. 147, Risley's case, for the northern lot, the court left the jury to treat testimony of witnesses as of more effect than all the documentary proof offered by the plaintiff; and, indeed, allowed the record title of the plaintiffs to be overturned by oral testimony which did not conflict with it.

ARGUMENT.

The legal effect of plaintiff's evidence of title being the assignment to the Schools, is fully stated in the case of Kissell vs. The Schools, (18 Howard, 21,) and is argued at length in the printed brief in No. 27, The Schools vs. Walker. This court say: "We are of opinion that the certificate of the surveyor-general * * is record evidence of title," * * and it is not open to the courts "to inquire whether the lands set apart were or were not lots of the description referred to in the statutes. The parties interested have agreed that this land was a school lot, and here the matter must rest, unless some third person *can show a better title.*"

In Jones vs. Soulard, 24 How., 41, the school title was again sustained by this court; and also in very many cases by the Supreme Court of Missouri, (see case of Kissell vs. Schools, 16 Mo., 553, 582,) where the court say: "And where the party produces the designation to the Schools of a particular lot, * * he has shown a *legal title complete in form*, and it devolves on the opposing claimant to defend himself by showing a better title."

The plaintiff having thus shown a complete documentary title to land precisely marked out by a survey of the United States, was entitled to recover the land unless the defendant proved "a better title."

The defendant therefore had the burden of proof thrown upon him.

His title was under the same act of Congress that gave plaintiff title.

To the plaintiff was granted the public land by that act—the assignment proved this; to the defendant the lot was granted only in case it was a town lot on the 13th June, 1812, and as such had been occupied in the old Spanish town prior to 20th December, 1803. The act of 1812, therefore, gives no better title to town lots to individual owners than to school lots to the public, and it is as susceptible of proof on behalf of the Schools that the lot in question was public property, and therefore not a town lot, as against a private owner claiming it as a town lot, as the reverse of this would be. There is, therefore, no presumption against plaintiff's title in favor of the defendant's merely because defendant claims under the 1st section of the act. The real question in the case, therefore, is whether the property fell within the description of property given by the second section to the Schools, or the first section to individual owners.

The proof of title in defendant in Risley's case, No. 147, is as follows:

First, confirmation to Louis Ride by Bates, recorder of land titles in 1816, and United States survey of the same, (pp. 31, 33, in No. 148.) And also the title papers of the adjoining property on the south, calling for Ride as in same block.

The proof of title in Leveille, Schoenthaler case, No. 148, is also a confirmation, (p. 23, No. 147,) and United States survey of same, (p. 28, No. 148.)

Here is documentary evidence of title to both parcels of land lying within block 44 of the old Spanish town,

and Pourcelli, defendant's witness, says: "Block No. 44 was inside of the old town of St. Louis as it was in Spanish times. This block did not in Spanish times extend as far eastward as where Main street now is."—(p. 19, No. 147.)

The same witness testified for the defendant in No. 148, pp. 18, 19.

In the case of Schoenthaler, No. 148, the defendant claims title under the Spanish concession to Leveille.—(See instructions 3 and 4, p. 41.) The confirmation and survey of the Leveille title is set out, (p. 23, No. 147; p. 28, No. 148;) thus showing an actual location of the land claimed under the concession, as such claim is made in the case at bar—(No. 147.) And of this the case of Smith v. The City of St. Louis, 21 Mo., 36, says "where the confirmee of a Spanish concession accepts a survey calling for a street along the bank of the river in an incorporated town, *as a boundary*, he will not be entitled, as a riparian owner, to land subsequently formed by accretion, although his concession may have called for the river as a boundary."

These confirmations and surveys given in evidence by the plaintiff were the documentary evidence of title of the Spanish *town lots*, as the same had been proven up in the case of Risley as early as 1816, four years after the passage of the act of 1812, and only thirteen years after the change of government, and in the case of Leveille in 1825. They confined the lots to the ordinary depth of town lots in the old town, and are based upon the principle that a Spanish town lot given by the government for a village residence was in conformity with the general plan of the town. Such was the actual proof made at the early dates named, when both the government as well as the private owners could produce many witnesses of proper age to establish the true extent and of title.

The proof thus taken is evidence of a limit to the lots in question as town lots, and proper evidence of title.

At that time there was no accretion, and no one thought that Congress in 1812 designed granting away the river front of the town under the description of a town lot.

What had been public property when the town plan of Chouteau was settled upon in 1764 for the common use of the town, descended to the public when the country was ceded in 1803; and even though in 1812 the land which embraced the lot in controversy was under water, yet, if by the plan of the town there was a margin of public ground in front of this block, and this block had by such plan an actual boundary on a line in common with the blocks further north, then such public plan must control the private property, and such public space is the actual limit of the blocks and the lots composing them.

If there ever was a vacant public space reserved for common use as a landing or street by the public plat in front of these lots, such as marked on Chouteau's map, the public title would not pass to private lot owners, even though the encroachments of the river might wear away that part of the soil above water. The river bottom within such lines would remain still subject to the same title. Now, Chouteau's map is an ancient document which establishes the line of this block 44 in the relative position that it occupied in 1764 with reference to the blocks north of it, and we thus can certainly fix the precise line of the front of block 44 as indicated on Chouteau's map and as it was in 1764. The blocks to the north, remaining as they were in 1764, and giving a uniform and permanent front line to the old town where they lie, thus serve to fix the precise position of such front line of block 44.

Now the block there in 1764 had a front line not touching the river, and there was this same public wharf that then and still exists to the north, extending along the entire front of the town—it was by Chouteau's map actual ground above the surface of the water. This was public property, established by a title paper of conclusive effect, if admissible at all.

The question, then, of controlling importance in this case is, whether Chouteau's map and the other documentary evidence was evidence of what was the plan of the town, showing the blocks, streets, and lines of public and private property.

This depends upon the construction of the act of 1812. This act required the United States surveyor "to survey the out-boundary lines of said towns so as to include the out lots, common field lots, and commons;" and he was directed to make out plats of the surveys and transmit the same to the Commissioner of the General Land Office and recorder of land titles; the expense "*of surveying the said out-boundary* lines shall be paid by the United States."

Sec. 2d says that all town lots "*included in such surveys*, which are not rightfully owned by private individuals, are reserved for the support of schools."

And an act supplementary to the above, passed 26 May, 1824, made it the duty of the surveyor-general "to survey, designate, and set apart to the said town so many of the vacant lots for the support of schools," (as were reserved in the act of 1812), and not exceeding one twentieth of the whole lands included in the *general survey of such town, according to the provisions* of the 2d section of the act of 1812.

This act is in all its provisions binding upon individual owners, and they must take their titles subject to the survey it calls for; what it reserved to the United States was and continued to be, public land, and the surveys it required became, when made, muniments of title.

Although the act is deficient in not providing for surveys to designate for individuals owners the lots granted to them, as stated in Guittard vs. Stoddard, 16 How., 494, 510, yet it does require surveys which shall show the boundaries of the towns, and with the act of 1824, surveys designating what portion of the public lands are granted to the Schools. These surveys, when made, are

conclusive evidence, under the acts of Congress, of what are public lands. The United States reserved the power to designate what it so granted to the Schools, and when designated the title passed. This is settled in Kissell vs. The Schools, 18 How., and there is nothing in the act to except the individual claimants under it from the proper legal effect of the survey.

Is the title given to individual owners by the first section of the act of 1812 any stronger because the law does not provide for a survey of such lots? Had a survey been provided for it would have been made by the surveyor general, and would not have embraced what he found to be public land. Such survey was provided for in the act of 1824 as to school lots and as to commons, which were also granted by the 1st section of the act of 1812.

It was held in Carondelet vs. St. Louis, 1 Black., 179, 188, that although the land was granted by the 1st section of the act of 1812, yet that "the power was reserved by Congress to the executive authority to survey this by including it in an out-boundary survey.

It was contended by Mr. Ewing, on page 185, that "on the passage of the act of 1812 the title of Carondelet was perfect to all the land which she possessed prior to 1803 by well defined and undisputed boundaries, and that title was not defeasible by any subsequent survey of a "federal officer," (and this principle is asserted in instruction 5, page 41, No. 148, given for Risley.)

But the court in the Carondelet case hold that the general scope of the act of 1812 amounts to a reservation of such power to designate by survey what was granted under the 1st section. This was as between two individuals claiming under that section. *A fortiori* should it be held that the express provision as to survey applicable to school lands gave the power to make a binding survey as to all grantees under that act. This was a part of the public land reserved, and the act is to be construed most favorably for the public interests, and especially is it to

have such construction as against individual owners under the act of 26th May, 1824, or of 1816, who proved up their lots, and thus gave power to the United States to survey the same. By construction of the act of 1812 given by defendant, a public survey of a reservation which the President might have chosen to make out of the public lands of St Louis would not prevail over verbal proof of title such as is offered here.

This is contrary to the whole current of decisions of this court respecting surveys of grants of land made under the laws providing for such grants.

West vs. Cochran, 16 How., 403.
Willot vs. Sandford, 19 How., 79.
Carondelet vs. St. Louis, 1 Black, 179.
Menard vs. Massey, 8 How., 313.

It is a misconstruction of the act to diminish the effect of the survey, which is provided for, as against other titles given in the same act. Had the plaintiff claimed under an older act of Congress his argument would have been perhaps stronger. The survey is conclusive against the government, but the defendant argues not against him.

A grant of title, that Congress reserved the power to locate by survey, and promises to so locate, is not available as a title, if the very same act be interpreted to mean that such location, when made, may, at any length of time, be overthrown by parol evidence.

Because defendant has no survey all other titles under the same act ought to be placed on the same loose footing.

This places plaintiff's title at the mercy of a single witness; for the act of Congress provides for no other evidence of title in plaintiff, and we see the effect of this construction of the law in practice when a jury decides in support of the views of the court below, against the survey, on the recollection of one single witness, Pourcelli, testifying in 1863 to what sixty years before he thought as to the description of the premises.

For the act of 1812 confirmed on possession *prior to 20th December*, 1803, and the only witness of plaintiff who spoke of events so far back was Pourcelli.

The possibility that a regular survey and assignment, of the validity and effect given to this by this court in Kissell's case, can be overthrown by the recollections of a child as to a matter that perhaps he had the slightest means of observing, and not become material until he was seventy-nine years of age, shows a construction of this act by the court below, contrary to good sense, to security of titles, and to the current of decisions of this court.

The surveyor-general, under the acts of 1812 and 1824 was charged with a duty that he then could readily and accurately perform, and this was to gather together all the archives and documents which had been before the boards of commissioners, and were recorded in the recorder of land titles' office, and determine where the different kinds of property were located. The Spanish concessions were open to him, Chouteau's map, and all that could furnish him with information; and also innumerable intelligent witnesses, including the large land owners, the proprietors of large tracts of land, the members of the boards of commissioners, who had investigated officially all these public facts. In the light of all these investigations was filed in the recorder's office Chouteau's plat, and no error in it has ever been pointed out.

It is from such material as all this that the assignment to the Schools is made up. On this material the surveyor-general was made a special judge, and it was for him to ascertain and decide what was public land and what not, and in Kissell vs. Schools, 18 Howard, 25, this court say: "We are of opinion that the certificate of the surveyor-general * is *record evidence of title*," &c.

Of what value is this record evidence of title, although the law required it to be given, if it can be overturned by the recollections of an ignorant child, detailed in old age, after a lapse of sixty years.

It could have been consistent only with the rulings of this court in other cases to have declared that this survey was authoritative and conclusive against another title under the same act, not sustained by a survey.

The surveyor-general could not have ascertained, from the records in his office, and those of the United States recorder of land titles, and other public archives, that this was public land without deciding that it was not private property. If it was not a lot prior to 20th December, 1803, it was public property. If it was not in any block, but was part of the public property shown by Chouteau's map, and other evidence which the surveyor was charged to examine, then it was not of the description of lots which individual owners were entitled to prove occupation of under the act of 1812. Was not this very fact submitted to the surveyor-general? This court says it was in Kissell's case, and he was, therefore, a competent judge, designated to enquire into the facts. The facts so enquired into by him the court in Missouri has gone into, in 1863, on the best evidence which then could be procured. Its conclusion depended upon the uncertain verdict of a jury, based on slender testimony, which it elevated in the scale of evidence above the decision of the surveyor-general and the other record evidence. Its mistake was not to give the proper effect to the evidence of title offered by plaintiff.

There is, in the public archives, in the recorder's office and surveyor-general's office, in St. Louis, and in the land office here, full evidence of the establishment of St. Louis as a Spanish town, with streets and blocks, public places, and lots used for cultivation, called common field lots, and town lots, and barn lots. There were public authorities, who regulated streets, commons, bridges, and all general matters.—(See this, copied in Mackay vs. Dillon, 4 How., 430, entitled "Proceedings of Syndics," who had been "named as such by the meeting of inhabitants, holden in the government chamber, on 22d September,

1782;" see also the following from the case of Strother vs. Lucas, 12 Pet., 412):

"By the evidence it appears that in 1764 the post of St. Louis, in Upper Louisiana, was first established by the French, under Mr. Lacleide. In May, 1770, the Spaniards, under the treaty of 1764, took possession of St. Louis and upper Louisiana. Between the years 1764 and 1772 divers grants of land in upper Louisiana were made by the French and Spanish authorities respectively. Amongst those grants were some forty or fifty, containing each from one arpent by forty, to four arpents by forty, located in the prairie immediately west of the then village of St. Louis, and extending some distance north and south of it. These lots extend westward to the uniform depth of forty arpents, being parallelograms whose opposite sides are on the north and south forty arpents in length, and on the east and west from one arpent to four arpents.

"Some time in the year 1772 a survey was made, as above described, of these lots, by Martin Duralde, the authorized surveyor of the post of St. Louis.

"About that time a fence was established on the eastern boundary of the above range of lots, which separated them from the village and what was called the commons; there was no division fence, nor any fence on the western boundary; the lots were contiguous to each other; but each lot was held separately, and cultivated separately, by its proprietor or occupant, who was bound, by the regulations of the post, to keep the fence in front of his lot (or of whatever number of lots he occupied) in good repair."

These records show that the town plan was clearly and authoritatively defined, and different kinds of property designated by visible, notorious, and permanent monuments. Possessions were taken and held only in conformity with these public regulations, which had the force of law, and were invariably and universally obeyed.

The plan of the town established by Chouteau's map, and which is stated as authoritative by the Supreme Court of Missouri in 31 Mo. Rep. Smith vs. The City excludes any individual owner from the river, and thus cuts off

private riparian rights.—(See 21 Mo., 36; 30 Mo., 304, 399.)

The defendants, to avoid this result, attempt to prove another plan of the town by showing that the street along the rear of their lots shifted east and west as the river receded or encroached.

But the little passage-way spoken of by the witnesses was not the public space marked on Chouteau's map.

The court below made the decisive question of fact the nature of this little passway as it was within the knowledge of the witnesses. But this was turning attention to a small and almost immaterial matter, and excluding the public space shown by Chouteau's map, which established the character of the land, from the jury.

The act of 1812 is an American title paper. It rejects concessions, and treats of public and private property in the same act, and disposes of both.

Under this act the defendant seeks to set up the Spanish concession to Leveille as a controlling evidence of title, and the court so instructed in No. 148, p. 41, instructions 3 and 4. This is contrary to the law as declared in the following cases.—(Page vs. Scheibel, 11 Mo., 167, 186.)

"Now, this act of Congress confirmed village lots solely on the ground of inhabitation. * * Concessions were not alluded to in the act, and had *nothing to do* with the foundation of the claims. * * The thing confirmed was *not the concession.* * * The controlling feature * is *inhabitation.*"

Guittard vs. Stoddard, 16 How., 494, 570, says "the act of 1812 makes no requisition for a *concession,*" &c. * * "*Congress in this act was* not dealing with *written* evidences of right. *Such* claims in Missouri have been provided for by other acts. These village lots proved a residuum, &c. *Congress afforded no* means of authenticating the rights," &c., cites the early Missouri cases and Page vs. Scheibel.

The instructions given here are identical in effect with

the instruction given in McKay vs. Dillon, 4 How., 448, thus: "The following instruction was asked for and given on part of the defendant: That the *claim* of the inhabitants of the town of St. Louis to commons, as exhibited in the copy of the claim given in evidence, was confirmed by the act of Congress." * *

It *assumes*, *as a matter of law*, that the act of 1812 adopted KcKay's survey and the evidence given in its support; that they are part of the grant, as to its *extent* and legal effect, &c. (It was *part of the claim.*) See same case of McKay vs. Dillon, 7 Mo. R., 15, where the court held that the *claim* was confirmed, and which was reversed by this court on that ground in Mackay vs. Dillon, 4 How., 448.

The court below also refused all instructions which declared that the United States confirmations and surveys were the best evidence of location.

The plaintiff relied upon documentary evidence to prove the existence of streets and other public grounds, and asked the court to declare thereon, as a matter of law, that such evidence was conclusive that the ground was public, and cut off private claimants from encroachment thereon. No proof that a person having a lot next to such public grounds, used such public ground could make out a title, under the act of 1812, to any part of the public property. Under the former government there was no private occupancy of such public places, and the act of 1812 did not intend extending possessions of individuals to public lands.

Smith vs. The Schools, 30 Mo., 304, 399; Smith vs. The City, 21 Mo., 36, are authorities in favor of the plaintiff.

In Schoenthaler's case there was absolutely no proof of any confirmation under the act of 1812, except that given by plaintiff in rebuttal, being the documentary evidence. The defendant did not profess to take under the confirmation of which he gave proof by verbal testimony, for

his proof was to establish an out-standing title in some unknown third person. Now it was of the essence of such title by the act of 1812 that there should have been a right and claim, as well as possession.

In Barada vs. Blumenthal, 20 Mo., 162, the case turned on the existence of the claim to the lot in 1812, and the court supported an instruction declaring, notwithstanding proof of possession, if there was evidence to show an abandonment of the claim, it would defeat the title. See also Page vs. Scheibel, 11 Mo., 167, 182, to same effect.

If abandonment of a lot is evidence which deprives possession of all effect under the act of 1812, is not proof of extent and boundaries under the act of 1824, and an actual survey, conclusive evidence of location, and therefore final here on the fact that the private lot did not embrace the land reserved for the Schools.

It has been held repeatedly that surveys by the United States are evidence of the location of lots confirmed under the first section of the act of 1812.

In Soulard vs. Allen, 18 Mo., 590, there was a confirmation under the act of 1812, evidenced by proof before Hunt, recorder under the act of 1824, and a United States survey of same. It was objected that the survey was not evidence of the land confirmed.

The court say: "*The survey annexes itself to the confirmation*, and prima facie shows the land granted. * * The survey is evidence of the locality of the land confirmed by the act of 1812."

McGill vs. Somers, 15 Mo., 80, 87, says.

"Several of the instructions given involve the question, how far the surveys made under the authority of the United States are evidence of the true location of the claims surveyed. The government has provided, from the time of its first action upon land claims in Missouri, for surveys to be made by its own officers, and by the 1st section of the act of 29 April, 1816, providing for the appointment of a surveyor in Illinois and Missouri, *it is made his duty* to cause to be surveyed all lands, the claims

to which have been, or may be hereafter, confirmed by any act of Congress."—(3 Statutes, 325.)

"Surveys of these claims are alike necessary to the claimants and the government. To the claimants, in order that they may have the boundaries of their land defined, and to the government, that the lands may be ascertained, which are subject to disposition under its laws. The acts of Congress thus imposing the duty upon the officer, acknowledge the right of every person to have his land surveyed. When the survey is made and passes through the examination and receives the sanction contemplated by law, it is conclusive upon the government. It is, in like manner, conclusive upon all persons who claim title to the land under titles originating subsequent to the survey, and it is, of course, conclusive upon all mere intruders and strangers without title to the land. It is prima facie evidence of locality against all persons who claim under an opposing title, for to make it less would be to deny to the claimant the right to have his land designated and set off to him, which the laws have always conferred. If there is a conflict with another title, it must be with a claim having its locality ascertained by another survey, and when two surveys thus conflict, the *question of the proper locality of each* is to be determined by evidence running back through the whole history of both claims. If it appears, when all the evidence is presented, that the two titles, when properly located, cover the whole or part of the same land, then the right will be determined as a question of law in favor of the party whose title by its character and age is the superior title."

The survey here was one of a confirmation under the act of 1812. This decision was in 1851.

It was decided by the Supreme Court of Missouri, after the most elaborate argument, that the title to the commons of St. Louis and Carondelet, because confirmed by the first section of the act of 1812, could not be affected or designated by any subsequent survey thereof; that the title having passed from the United States, the location and extent was a matter to be determined by a jury.

This was first held in Carondelet vs. McPherson, (20 Mo., 192, 201, 1854,) where Carondelet was allowed to

prove title without a survey. The next case was City of Carondelet vs. City of St. Louis, (25 Mo., 448, 1857,) where the survey of St. Louis commons was held not conclusive against the Carondelet commons title supported by no survey, and on mere proof of occupancy and user, under the 1st section of the act of 1812. The court say (pp. 459–60): "The act was a complete divestiture of all the title of the United States, and, nothing being reserved by the government, nothing was required to be done by the confirmee."

The case was up again in City of Carondelet vs. St. Louis, (29 Mo., 527,) and the law, as previously settled in the two former decisions, was not doubted. This last case was brought to this court, and is reported in 1 Black, 179, 185. The principle was at once relied upon that the act of 1812 passed title, and therefore the executive department could make no survey.—(See Mr. Ewing's argument, p. 185.) But the court held, first, "Where suit is brought in a state court by a town, claiming part of its commons, under the act of 1812, and the defence is that there was a survey in pursuance of the federal statute which estops the plaintiff to set up his claim, this court has jurisdiction." Second, "The true construction of the act of 1812 is that it granted to the inhabitants of the towns therein named their lands used in common for pasturage, but reserved the authority to define the limits of those common lands by a survey."

This reservation of power to survey was no more explicit and in no other terms as to commons than as to the town lots, for the same first section regulates both. But all the sections of the law apply to all the subjects of it. The first section directs a survey, and express mention of the survey of the commons is found in the second section of the act of 1824, which also provides for survey of the school lots.

But the court saw, from the numerous and interminable suits which sprang up under the Missouri construction

of the act of 1812, and the supplementary acts thereto, which made those confirmations exceptional ones as to the power of the government to locate and designate the lands those acts disposed of, that endless confusion would arise. It became necessary to put a stop to such consequences for the court to decide, that it did not find, in the first section of the act of 13 June, 1812, any intention on the part of the government to abandon its established practice of designating lots granted by its own executive officers. To construe the act of 1812 otherwise, is to break up the regularity of the land system within the jurisdiction embraced by the act, and to impute a design to Congress at variance with all rules existing prior and subsequent to that act. And there is nothing in the act requiring such construction for the protection or completion of the rights it confers. As soon as it was declared, in the case of Carondelet vs. McPherson, in 1854, that the United States had no power under the 1st section of the act of 1812, to survey the commons it granted, the people of St. Louis and Carondelet became at once involved in litigation about titles claimed to be in both commons, and the foundation of these innumerable suits was this same error of construction of the act of 1812; and it is a matter of public history, within the knowledge of the authors of this brief, that, when the decision in the City of Carondelet vs. The City of St. Louis was rendered, in 1 Black, 179, in 1861, that a large number of suits to evict possessions within the St. Louis commons were pending, brought on the loose principle decided in McPherson vs. Carondelet, and were, by the reversal of that principle by this court, in Carondelet vs. St. Louis, 1 Black, 179, forever settled. The simple point which settled so much litigation, and gave so much relief to those who, for years had, without suspicion of infirmity of title, held, under the St. Louis survey, made in 1832, was, that Congress had not, in the act of 1812, given up the power to define and locate by survey the lands embraced in the first section.

Schoenthaler, not claiming title, and setting up the only defence of an outstanding title, in Leveille's representatives, cannot question the correctness of the survey of the Leveille lot. This was expressly decided in Boyce vs. Papin, 11 Mo., 16, 25. The court say, in answer to an objection, that the survey was no evidence of location of a lot confirmed on grounds of possession, "that the ascertainment of Chouteau's possession is expressly referred to the surveyor-general by the act of 1824, and when the evidence is taken, and the surveyor is satisfied, a stranger, who shows no title in himself or in another, should not be permitted to question its correctness. * * * To ascertain the locality of a barn lot in 1842, depending on a possession prior to 1804, where, perhaps, a barn has not stood for thirty or forty years, is a matter depending upon the fleeting memory of witnesses. * * The agent of the United States has located the lot to the satisfaction of the claimant. Why should a stranger be permitted to question its propriety? * * * But it has been suggested in argument that there is an outstanding title to all the vacant lots in St. Louis in the Public Schools."—(1847.)

And Risley is equally bound by the United States survey, on the principle stated in Menard vs. Massey, 8 How., 293, 313.

Riparian Rights.

Congress never, since the act of 1812, has passed any act concerning lands within the out-boundaries of the town of St. Louis, excepting the acts of 1824 and 1831, to complete the title to the reserved lots; thus showing that Congress considered that this act disposed of everything within those boundaries.

The *reservation* in second section of the act of 1812 is as complete a bar to the accrual of any adverse title as a direct grant of title would be, on the principle settled in Wilson vs. Jackson, 13 Pet., 498.

The act of 1812 operates on the possession prior to December, 1803. Testimony to prove such possession, with a view to the establishment of title under the act, should have been restricted to that date. It was a misconstruction of the act to admit testimony referring to a later date to establish riparian rights in the defendants.

The proof of occupation, &c., prior to 1803, which the record contains, did not authorize the court to submit the question to the jury. The only witnesses—Pourcelli and Sanguinet—who speak of the possession as of that date, prove that a public road intervened between the enclosures and the river, and prove no fact which authorizes a jury to find that the occupants of the lots were riparian owners.

The question in these cases is essentially the same as decided in the cases of Smith vs. St. Louis, 21 Mo., p. 36; 30 Mo., p. 290.

The property in question there is shown in figure 2, Conway's map, and lies one square above the block here in dispute, and in front of block 42. Smith claimed, as riparian owner, in virtue of his ownership in block 42.

The grant under which he claimed the alluvion called for the river, and for a street on the river front. In the first case the court decided against him on the ground that the survey of the confirmation controlled, citing Menard vs. Massey, 8 Howard, p. 303. The court add, 21 Mo., p. 40: "There is no doubt that many concessions of lots in St. Louis were granted under the Spanish government with boundaries fronting on the river. August Chouteau, in 1825, filed, among the archives of the city of St. Louis, a plat of the said city as it was designed by him *as its founder*. He did not pretend, however, that the plan was made in virtue of any public authority. This plat shows that there was a vacant space left between the river bank and the lots fronting on Main street on the west. In June, 1810, the first board of commissioners for adjusting land titles in Missouri, while acting on a

claim of Julian Papin Benito, which was for a lot back to the river from another lot adjoining Main street, says: 'it is the opinion of the board that this claim ought not to be confirmed. This space has been termed the bank of the Mississippi. The lots between Main street and the Mississippi being one hundred and fifty feet only, as appears by the plat of the town of St. Louis, recorded by Pierre Chouteau and others in behalf of the inhabitants of said town, as also in all the old concessions given for said lots; and it appears from said plat that a nearly similar space of ground exists between the Mississippi and all the other lots that are situated between the Mississippi and Main street.'" * * "The case of Mullanphy's Ex's vs. Daggett and Price, 4 Mo., p. 343, does not affect the matter under consideration. That was an action of *quare clausam fregit* for injuries done on the Yosti concession, which, though bounded east on the river, was situated *north of the old Spanish town.*" [For the same reason the case of Lebeaume vs. Gaven, 37 Mo., 556, does not apply, that lot being south of the town shown by Chouteau's map. Another reason, however, is, that the question of riparian rights was not raised by this case.] "The case mainly relied on by the plaintiff is that of Morgan vs. Livingston, 1 Cond. La. Reps., 451." The court holds this inapplicable to lands in Missouri. The court decides this case on the survey, but adds, p. 42: "In coming to this conclusion we do not wish to be understood as intimating the opinion that the plaintiff's eastern boundary was not properly located. We do not go into an examination of that question, nor do we wish to be understood as expressing any opinion in relation to the rights of riparian owners of lots in the city of St. Louis, *nor as intimating that the town of St. Louis, in regard to riparian proprietors, stood on no other ground than a private* [*rural*] *grant, bounded by a water-course, under the Spanish government.*"

In the second case, 30 Mo., p. 290, to obviate the effect

of the survey, the plaintiff relied on parol proof under the act of 1812. Defendant introduced the plaintiff's confirmations and survey. Plaintiff insisted, p. 297, that the survey for him, introduced by defendant, could not limit his right or deprive him of the accretions. The court held that such a grant, if of rural lands, would be riparian, but being of a town lot, limited by the street, it was not riparian, though *calling for the river also.* The argument of plaintiff, p. 297, was, that St. Louis was not an authorized town under the Spanish government; that New Orleans was the only legally established town, and that, therefore, grants in St. Louis, calling for the river, were rural and riparian. But the court held, p. 307, quoting Judge Martin, that the rule, even in New Orleans, does not rest on the fact that the town was an authoritatively established town, but on the fact that the existence of streets, according to the plan of the town, made the lots *agri limitati*, and not being subject to the burdens, the owners are not entitled to the privileges of riparian property. The question is, whether the land had *fixed* limits, as by a street, or one variable with the water-course, and this, he shows, p. 308, is the essential difference, as a boundary, between a rural road on the river bank and a street in a town, *the one being fixed by the plan of the town and the other shifting with the river.* Lots in a town, which were limited by the plan of the town, by streets and public places, were *agri limitati.* Town lots, like rural lands, might be bounded by a river, and if so, were *agri arcifinies.* "But the question is," says the court, p. 301, "whether a lot, which is bounded or limited by streets, can, with any propriety, be said to be bounded by a river. Is it not *agri limitatus*, within the definition of that term, as understood by the civilians." And this is the question in this case. Proof was there given, as in these cases, to show that, till a recent period, the actual boundary of the lot was the river.—(pp. 292–3.) Paul's map and other evidence was offered to show that there was no street in

front of block 42, and that Main street did not extend to that block. The court held all this, and the testimony about a "*little passway*," to be immaterial, the fact being established that the street existed, *though submerged*, the street was the boundary.

The existence of the street or public place in front of block 44 is equally as well established in these cases as it was in that. The only difference between Smith's and these cases is one that should obviate all difficulty. It created the questions in the Smith cases. Here there is *no call for the river in the grant.* In the Smith cases the Recorder's confirmations called for "Front street or the Mississippi river, leaving a road between it and the river," (p. 291,) and the concession confirmed by the old board was of a lot "*du côté du Mississippi et y faisant face*," equivalent to fronting on the Mississippi, and equivalent to the words in Poeyfare's deed, "*face au fleuve*," p. 305, which, by the decision in Morgan vs. Livingston, 6 Martin, carried riparian rights. Here we are not embarrassed by any call for the river. The grant is only for a town lot which had been inhabited, &c., to which the proposition of McEllery, in reference to New Orleans, quoted by the court, p. 305, applies. "*Its lots are all bounded by streets, and are sold, whether so expressed or not, according to its plan.*" With equal reason lots in St. Louis granted by Congress, whether so expressed or not, should be held to be, "according to *its* plan."

It is not pretended that the occupation proved extended beyond block 44. Pourcelli, the only witness for defendants, who testifies as to the occupation of the lot prior to 1803, testifies (p. 19) that the lot was then about 300 feet deep, and there was, "in Spanish times," he says, between the enclosure and the river, "a passage-way of about 10 feet wide. The public had the right to pass there the same as the people have to pass on a street or alley." Sanguinet, a witness for defendants, testifiies that there was, in Spanish times, a road between the lots and

the river which extended the whole length of the town, and was about 15 or 16 feet wide in front of Mad. Charleville and Leveille. "The people used said road as other public streets in St. Louis." Pourcelli says, when he was about 18 years of age, which would be about the year 1802, still Spanish times, the fence had to be removed west because the road had fallen in. This made the river the actual boundary of the block in his view, and it is in this sense he is to be understood when he says "in Spanish times the river was the eastern boundary of block 44." It was the boundary in his view, because the river had washed away the street in front. He was an illiterate man, unable to sign his name, not qualified to decide, and not undertaking to decide, the question now before the court as to what was the legal boundary of the block. His statement that the river was the boundary can only be taken as another form of repeating the facts elsewhere stated by him, that the river had washed away the street "in Spanish times." But the washing away of the road or street, and the invasion of the enclosure, which are the facts to which he testified, do not make a *prima facie* case of river boundary in contemplation of law. The road or street washed away was, he says, a road used just as any other public street or alley. This fact puts the street on the east on the same footing as a boundary with Second street, which bounds the block on the west. There was never, after the street, which the witnesses call a "public street or road," was washed away, any street or road on the bank in front of the lots till the city projected the cross-streets above and below the block, beginning in 1844, and filled in and reconstructed Main street. This fact is clearly proved by defendants' witnesses, and is uncontroverted. Hortiz, page 20, says: "The first I knew particularly of block 44 was in 1808. Leveille and Tayon's lot ran *to the river;* was never any street between the east of these lots and the bank of the river. The ends of the fences

would have sometimes to be moved back on account of the abrasion or falling in of the bank." On cross-examination he said: "There was no passing east of block 44; was no public road there. * * * The ground between the bank and Duncan's Island never began to fill up until the cross-streets were projected into the river."

David Adams, p. 21, says: "I can remember as far back as 1806 or 1807. * * The fence on Tayon's lot ran back of the river [*back to the river*] when I first knew it. He had to move the fence back. When he did so he left a space or passway for *his own convenience;* * * never was a road to my knowledge between the block and the bank of the river from Plum to Cedar streets." Dowling, p. 43, says: "Have known block 44 since 1817; * * * never knew of any street along there."

William H. Cozzens, another witness for defendants, proves (p. 26) that Rene Paul's map was made in 1823. This map, put in evidence by defendant, p. 25, shows that the street and much of the block was then under water, and that there was no road or street on the bank in front of the block. *Still the map bounds the block, not by the river, but by the street, and shows the fixed location of the street as it existed from the beginning unchanged, though under the water, in* 1823.

There is no warrant, therefore, on defendants' own evidence, taken in the sense most favorable to them, for the assumption by the court, in the first instruction given for defendants, p. 53, of No. 147, and the 2d, of No. 148, p. 40, that the block was bounded by the river.

There is no conflict between that testimony and that of plaintiff, showing the existence of a public street in front of this and other blocks in the old town by Chouteau's map; by Smith's cases, 21 and 30 Mo.; by the confirmations and surveys of Latresse, Blondeau, Hortiz, Ride, and Leveille; by the calls of ancient deeds, as in that of Blondeau to Lecompte, dated January 7, 1772, and

in that of Cerré to Callou, dated June, 1800; by the partition deed of 1825, of the Charleville lot, between Francis Tayon and Arthur Park, and Pelagie, his wife, known as Mad. Charleville; by the deed from Park to Rocheblave, from Tayon to Papin, and from Papin to Stearns and Risley, the defendant. The two last were introduced by defendants themselves, after the close of plaintiff's case in rebuttal, because it was found necessary then to connect themselves with the outstanding title in Mad. Charleville's representatives, which defendants did not intend to do in the outset. These deeds bounded the defendants by a street, if there be one, and estop the defendants from setting up a claim for the river boundary. But the court below not only assumed, in the instructions given for defendants, that there was proof to establish riparian rights, but refused to say that the existence of the street, which even the deeds to defendants recognized as the boundary of their lot, repelled the presumption of riparian rights.

Instructions 4 and 5, of plaintiff's instructions refused, p. 52, declare that, if the jury believed from the evidence, that, according to the plan of the former town of St. Louis, there was a space of ground left for a street, or otherwise dedicated to public use, between the lots and the river, the lots were not riparian.

The instructions for defendants, Nos. 1 and 2, pp. 54 and 55, of No. 147, and p. 40, of 148, declare that, if prior to, and on the 20th December, 1803, a lot of ground bounded east by Mississippi was inhabited, &c., the accretions thereto belong to those holding under such occupants, and that the existence of a public passway along the river did not affect this right if such passway was kept up at the charge of the occupants, and advanced or receded with the river. There was no evidence which authorized either of these instructions for defendants. The first, as to boundary, has been considered above. That as to the passway was also wholly unwarranted by

the testimony. There is not a syllable to prove either that the road was kept up at the charge of the occupants or that it shifted with the river. Sanguinet alone is questioned on the subject. On his cross-examination, p. 47, he says: "I do not know that the city or town ever expended any money repairing the road along the river; *the people kept it in order;* the first bridge across Mill creek was built by the inhabitants," &c. On re-cross-examination, p. 48, he says: "The road along the river was repaired by the *voluntary* act of the people living along the road, and not by public authority, or public taxes; *passengers and people* living along the road repaired it." After the public road fell in about 1802, as testified to by Pourcelli, there was, as we have seen, no public road at all in front of the block.—(See testimony of Hortiz, p. 20; of Adams, 22; of Dowling, p. 44.)

These are defendants' witnesses, and they are the only witnesses who testify on the point. The instructions, nevertheless, assumed that the evidence tended to prove a case similar to that of Morgan vs. Livingston, cited 30 Mo., 305, where it was said that, as the *law* imposed upon the proprietor the *burden* of repairing the road and supplying the ground for another, if it were carried away, it gave him the alluvion to compensate for the risk. Here the evidence fails to show either that the proprietors of block 44 repaired the road while it was above water, or furnished ground for another when it was submerged.

But the testimony introduced by defendants themselves establishes the reverse of this hypothesis conclusively. Their witnesses show that there was no road supplied elsewhere by the occupants of block 44 after that spoken of by Pourcelli and Sanguinet as a public road or street was submerged, and Paul's map traces this street at its proper site under the water, and extends the block to it, showing "that the lots had fixed and immovable limits," not affected by the water-course. It was by the city authorities, and at the expense of the city, that the

street was restored to use, and all the land in question reclaimed. This consideration had great weight in giving the *quai* to New Orleans.—(See 10 Peters, 717.) The right should be clear that takes from a community a property rendered valuable by public expenditure.

The court refused to declare, as requested by Nos. 6 and 7, refused instructions, p. 52, that the plan of the town was better evidence than oral testimony, as to the extent of the lots, and also that, as matter of law, defendants were not entitled to riparian rights. Chouteau's map has always been recognized as proper evidence of the plan of the town, not only by the courts of Missouri, but by the old board of United States Commissioners to settle land claims in that state.

The act of 1812 originated with that board, and was adopted to carry into effect its views, which were communicated to Congress by its reports, and through the letters of one of its members, Mr. Penrose, and its secretary, Mr. Riddick.—(Gales & Seaton's State Papers, Public Lands, vol. 2, pp. 448, 451.) And the Supreme Court of Missouri and this court have construed the act accordingly.—(Trotter vs. Public Schools, 9 Mo., 69; Kissell's case, 16 Mo., 184, *supra;* Guitard vs. Stoddard, *supra.*) In this way the courts have reached the accepted construction of the second section of the act as to the lands reserved for schools.

But the board was yet more explicit in *excluding* any *private lots* from the places shown on Chouteau's map as public than *in including* all vacant lands in the grant to the Schools.

The rejection of Benito's claim in 1810 is an express decision that the public places indicated in Chouteau's map could not be rightfully claimed by private persons. This decision would be presumed to be known to Congress, and enter into the construction of the act of 1812, even if the actual knowledge of the map by the authors of the law was not historically established. But when

the courts have treated the board as in fact the authors of the law, its decisions which explain, and fix its meaning become a part of it. Chouteau's map is therefore authoritative to exclude the private lots from the public places indicated on it. A similar map saved the *quai* at New Orleans.—(10 Peters, 662.)

The map of the old town of St. Louis is equally as authoritative as the map of the former town of New Orleans. The Supreme Court of Missouri say, 31 Mo., p. 113, "Chouteau's conduct, and that of his colleagues, in laying off the town was sanctioned and adopted by the Spanish government." It was accepted as authoritative, as we have seen, by the earliest and best imformed of the authorities of the United States, the board which shaped the legislation of Congress now under consideration.

The Supreme Court of Missouri affirmed both these cases on the ground that they involved only a question of fact, which had been submitted to the jury. This is a total misconception of the cases. There is no controversy with respect to any fact. The only questions are as to conclusions of law upon undisputed facts, established by documentary and oral proof. The cases depended altogether upon the proper construction, or legal effect of the testimony which the court was asked to determine, in the series of instructions refused, pp. 51, 52, and 53.

The first instruction given for defendant said that if Madame Charleville, prior to 20th December, 1803, possessed a lot, part of present block 44, bounded east by the river, and claimed title to it, and that river accretions have been made to said lot, embracing the premises in dispute, the jury must find for the defendant.

This instruction overlooks the consideration that it was proper for the court to declare that the plan of the town of St. Louis was evidence of the limits of the lot. It is a matter of law, which the jury may or may not know, that the rightful occupancy of a lot as private property could not apply to public ground; and it is also a matter

of law that a public map or plan of the town, and documentary evidence, consisting in the archives of the government, which are the proof of authoritative public proceedings, are binding upon the entire state, including all the individuals thereof.

The position of the plaintiff is, that there could have been no "*rightful claim*" to the public space on Chouteau's map, in front of this block; and that even if there was proof of its occupation, (which there is not,) such occupation would have given no title, and a *fortiori* there could be no title, founded on possession to the water's edge, after the submersion of this public street or space.

The second section of the act of 1812 says "that all town or village lots included in such surveys, which *are not rightfully* owned or claimed by any private individuals, are hereby reserved for the support of schools;" and the first section says "that the rights, titles, and claims to town or village lots, * which have been inhabited, cultivated, or possessed prior to 20th December, 1803, are hereby confirmed, *according to their rights thereto.*"

The word right or rightful is not found in said instruction, and it was clearly leaving a matter of law to the jury to permit the jury to extend the boundary of the lot by mere verbal proof of possession, to the river, against positive and conclusive evidence of another character, of the true boundary of the lot.

The jury were further misled by the second instruction given, p. 54, (No. 147,) which directed their minds to the shifting passage-way along the shore, on the top of the bank, as one of the features of the case.

Under these instructions, Nos. 1 and 2, given for defendant, if on the 20th December, 1803, or at the time testified to by the witnesses, the possession of the defendant reached the water's edge, no matter how shortened the lots may have become by the washing away of the bank, that could have given the defendant title to all subsequent accretion. On this theory, if the river had

washed away block 44, and Second street west of it, so as to touch the eastern edge of the lots fronting on the west side of Second street, and afterwards receded, the title of block 44 would have passed to the owners of the property west of Second street. Chouteau's map, Conway's map, and Paul's map, and the assignment to the Schools are all evidence proving that, under the Spanish government, block 44 could not and did not reach the river.

The *viva voce* testimony of old witnesses proved nothing contradictory of these maps and records, but only the fact within their recollection, which was nearly, if not altogether, after 1803, that the land above water did not reach as far east as the east line of block 44.

If, therefore, the jury believed the testimony of these witnesses, they would find for the defendant notwithstanding they might believe that, far east of the water line, on the plan was first established for the town, there was a public wharf reserved permanently for public use. There was a direct and irreconcilable contradiction between the instructions given for plaintiff and defendant. Instruction No. 7, declaring on the proof, as a matter of law, that the lots did not rightfully extend across this public wharf, under the act of 1812, which was refused, ought to have been given.—(page 52.)

The old deeds in evidence call for a street along the east line of the blocks, and the evidence of witnesses shows that prior to 1803 the east edge of the land was where the river afterwards ran. These and all the documentary evidence show that Chouteau's map was a correct designation of the Spanish town as actually established. There is nothing in conflict with these old deeds, and map of public survey, save only the call in the concession to Leveille, which was not confirmed, and was not evidence of the extent of the confirmation by the act of 1812, and was objected to, and improperly admitted in evidence.

SUMMARY.

(1) Assignments to the Schools by the Land Department conclusive against individuals claiming on oral testimony under acts of 1812 and supplementary acts—the common source of title.

(2) Concessions not confirmed by act of 1812, and not competent evidence to establish the location or extent of the lands granted, or any of the conditions of the grant.

(3) Public surveys of confirmations binding on the confirmee,—a proposition which applies to claims proved before recorder, under acts of 1812 and 1824.

(4) No proof in the record tending to establish riparian rights in defendants, or which authorized the submission of the question to a jury.

(5) Such rights could not be established within the old town of St. Louis shown by Chouteau's map, by oral proof, against the plan of the town recognized by the Spanish and American authorities.

(6) The instructions of the circuit court were contradictory, and submitted questions of law to the jury.

M. BLAIR,
F. A. DICK,
For Plaintiffs in Error.

APPENDIX.

Act of 13 *June*, 1812.

The act of Congress of 13th June, 1812, is in words and figures as follows:

Sect. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the rights, titles, and claims to town or village lots, out-lots, common-field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa à Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie, and Arkansas, in the territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the 20th day of December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: *Provided*, That nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in said territory. And it shall be the duty of the principal deputy surveyor of the said territory, as soon as may be, to survey, or cause to be surveyed and marked, (where the same has not already been done according to law,) the out-boundary lines of the said several towns or villages, so as to include the out-lots, common-field lots, and commons thereto respectively belonging. And he shall make out plats of the surveys, which he shall transmit to the surveyor general, who shall forward copies of the said plats to the Commissioner of the General Land Office, and to the recorder of land titles; the expense of surveying the said out-boundary lines shall be paid by the United States out of any moneys appropriated for surveying the public lands: *Provided*, That the whole expense shall not exceed three dollars for every mile that shall be actually surveyed and marked.

Sect. 2. *And be it further enacted*, That all town or village lots, out-lots, or common-field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby, reserved for the support of schools in the respective towns or villages aforesaid: *Provided*, That the whole quantity

of land contained in the lots reserved for the support of schools in any one town or village shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village.

Sect. 3. *And be it further enacted*, That every claim to a donation of lands in the said territory, in virtue of settlement and cultivation, which is embraced by the report of the commissioners, transmitted to the Secretary of the Treasury, and which, by the said report, shall appear not to have been confirmed, merely because permission by the proper Spanish officer to settle has not been duly proven; or because the tract claimed, although inhabited, was not cultivated on the twentieth of December, one thousand eight hundred and three, or not to have been confirmed on account of both said causes; the same shall be confirmed, in case it shall appear that the tract so claimed was inhabited by the claimant, or some one for his use prior to the 20th day of December, 1803, as aforesaid, and cultivated in eight months thereafter; subject, however, to every other limitation and restriction prescribed by former laws in respect to such claims; and in all cases where it shall appear by said report, or other records of the board, that claims to land have not been confirmed merely on the ground that the claim was for a greater quantity than eight hundred arpens, French measure, every such claim, to the extent of eight hundred arpens, shall be confirmed.

Sect. 4. *And be it further enacted*, That the recorder of land titles for the said territory shall, without delay, make an extract from the books of the said board of commissioners of all the claims to land which are, by the preceding section, directed to be confirmed, a copy of which he shall transmit to the Commissioner of the General Land Office; and he shall furnish the principal deputy surveyor with a proper description of the tracts so to be confirmed, wherein the quantity, locality, boundaries and connection, when practicable, with each other, and those tracts that have been confirmed by the board of commissioners shall be stated. And whenever plats of the surveys, as hereinafter directed, shall have been returned to the said recorder's office, it shall be his duty to issue, for each tract to be confirmed as aforesaid, to the person entitled thereto, a certificate in favor of the party, which shall be transmitted to the Commissioner of the General Land Office; and if it shall appear, to the satisfaction of the said commissioner, that such a certificate has been fairly obtained, according to the true intent and meaning of this act, then, in that case, patents shall be granted in like manner as is provided by law for other lands of the United States.

Sect. 5. *And be it further enacted*, That the principal deputy surveyor shall survey, or cause to be surveyed, under the direction of the surveyor general, so much of the land in the said territory, to which the Indian title has been extinguished, as the

President of the United States may direct, into townships of six miles square, by lines running due north and south, and others crossing these at right angles; and also the lands the claims to which are directed to be confirmed by the third section of this act; and the lands the claims to which have been confirmed by the board of commissioners, where the same has not already been surveyed under the authority of the United States. And the principal deputy surveyor shall make out a general and connected plat of all the surveys directed by this act to be made, or which have already been made, under the authority of the United States, which he shall transmit to the surveyor general, who shall transmit copies of the said plat or plats to the recorder of land titles and the Commissioner of the General Land Office; the expense of surveying shall be paid by the United States: *Provided*, The same shall not, in the whole, exceed three dollars a mile for every mile that shall be actually surveyed and marked.

Sect. 6. *And be it further enacted*, That in all cases where, by reason of the indefinite description of the local situation and boundaries of any tract the claim to which has been confirmed by the commissioner, the same cannot be ascertained by the principal deputy surveyor, it shall be the duty of the recorder of land titles, on the application of the said principal deputy, to furnish such precise description thereof as can be obtained from the records in his office and the books of the said board of commissioners; and for the purpose of the more correctly ascertaining the localities and boundaries of any such tracts, the said principal deputy shall have free access, at all reasonable hours, to the books and papers in the recorder's office relating to land claims, and be permitted to take copies, or such extracts therefrom, or any of them, as he may think proper and necessary for the discharge of his duty in executing such surveys. And the said recorder shall be allowed twenty-five cents for the description of each tract which he shall furnish to the principal deputy surveyor as aforesaid.

Sect. 7. *And be it further enacted*, That every person or persons claiming land in the territory of Missouri, who are actual settlers on the land which they claim, and whose claims have not been heretofore filed with the recorder of land titles for the said territory, shall be allowed until the first day of December next to deliver notices, in writing, and the written evidences of their claims, to the said recorder; and the notices and evidences, so delivered within the time limited by this act, shall be recorded in the same manner, and on payment of the same fees, as if the same had been delivered before the first day of July, 1808; but the rights of such persons as shall neglect so doing within the time limited by this act shall, so far as they are derived from or founded on any act of Congress, ever after be barred and

become void, and the evidences of their claims never after admitted as evidence in any court of the United States against any grant derived from the United States.

Sect. 8. *And be it further enacted*, That the said record[er] of land titles shall have the same powers and perform the same duties in relation to the claims thus filed before the first day of December next, and the claims which have been heretofore filed, but not decided on by the commissioners, as the board of commissioners had, by former laws respecting claims filed prior to the first day of July, 1808, except that all of his decisions shall be subject to the revision of Congress. And it shall be the duty of the said recorder to make to the Commissioner of the General Land Office a report of all the claims which shall be thus filed before the first day of December next, and of the claims which have been already filed, but not decided on by said commissioners; together with the substance of the evidence in support thereof, with his opinion, and such remarks as he may think proper; which report, together with a list of the claims which, in the opinion of the said recorder, ought to be confirmed, shall be laid by the Commissioner of the General Land Office before Congress, at their next session, for their determination thereon. The said recorder, in addition to his salary, as fixed by law, shall be allowed fifty cents for each claim which has been filed but not decided on by the commissioners, or which shall be filed according to this act, and on which he shall make a decision, whether such decision be in favor of or against the claim; and a further allowance of five hundred dollars, which shall be paid after he shall have made his report to the Commissioner of the General Land Office; which allowance of fifty cents for each claim decided on, and five hundred dollars on the completion of the business, shall be in full compensation for his services, including clerk hire, respecting the claims to be decided on according to this act. (Approved June 13th, 1812.)

Act of Congress 26th May, 1824.

No. 509. An act supplentary to an act passed on the 13th day of June, 1812, entitled "An act making further provisions for settling the claims to land in the territory of Missouri."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of individual owners, or claimants, of town or village lots, out-lots, or common-field lots, in, adjoining, or belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa à Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, and Little Prairie, in Mis-

souri, in the village of Arkansas, in the territory of Arkansas, whose lots were confirmed by the act of Congress of the 13th of June, one thousand eight hundred and twelve, entitled "An act making further provision for settling the claims to land in the territory of Missouri," on the ground of inhabitation, cultivation, or possession, prior to the 20th day of December, 1803, to proceed, within eighteen months after the passage of this act, to designate their said lots, by proving, before the recorder of land titles for said State and territory, the fact of such inhabitation, cultivation, or possession, and the boundaries and extent of each claim, so as to enable the surveyor general to distinguish the private from the *vacant lots* appertaining to the said towns and villages.

Sect. 2. *And be it further enacted*, That immediately after the expiration of the said term allowed for proving such facts, it shall be the duty of the surveyor general, within whose district such lots lie, to proceed, under the instructions of the Commissioner of the General Land Office, to *survey, designate, and set apart, to the said towns and villages* respectively, so many of the said vacant town and village lots, out lots, and common-field lots, for the support of schools in the said towns and villages, respectively, as the President of the United States shall not, before that time, have reserved for military purposes, and not exceeding one-twentieth part of the whole lands included in the general survey of such town or village, according to the provisions of the second section of the above mentioned act of Congress; and also to survey and designate, as soon after the passage of this act as may be, the commons belonging to the said towns and villages, according to their respective claims and confirmations, under the said act of Congress, where the same has not been already done: *Provided*, That lots relinquished to the United States on account of damages done them by the earthquakes, and in lieu of which lands have been located elsewhere, shall neither be so designated or set apart, nor taken into the estimate of the quantity to which any town or village is entitled.

Sect. 3. *And be it further enacted*, That the recorder shall issue a certificate of confirmation for each claim confirmed, and shall receive for the services required of him by this act, the sum of one dollar for each lot so proved to have been inhabited, cultivated, and possessed, to be paid by the respective claimants; and, as soon as the said term shall have expired, he shall furnish the surveyor general with a list of the lots so proved to have been inhabited, cultivated, or possessed, to serve as his guide in distinguishing them from the vacant lots to be set apart as above described, and shall transmit a copy of such list to the Commissioner of the General Land Office.

Sect. 4. *And be it further enacted*, That the provisions of this act, and of the aforesaid act of the 13th of June, 1812, be, and

the same are hereby, extended to the village of Mine à Burton, and the right of filing their claims with the recorder.

Act of Congress 27th January, 1831.

No. 718. An act further supplemental to an act entitled "An act making further provision for settling the claims to land in the territory of Missouri," passed the thirteenth day of June, one thousand eight hundred and twelve.

[Sec. 1.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States do hereby relinquish to the inhabitants of the several towns or villages of Portage des Sioux, Saint Charles, Saint Louis, Saint Ferdinand, Villa à Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, and Little Prairie, in the State of Missouri, all the right, title, and interest of the United States in and to the town or village lots, out-lots, common-field lots, and commons, in, adjoining, and belonging to the said towns or villages, confirmed to them respectively by the first section of the act of Congress entitled "An act making further provision for settling the claims to land in the territory of Missouri," passed the 13th day of June, 1812, to be held by the inhabitants of said towns and villages in full property, according to their several rights therein, to be regulated or disposed of for the use of the inhabitants, according to the laws of the State of Missouri.

Sec. 2. *And be it further enacted,* That the United States do hereby relinquish all their right, title, and interest in and to the town and village lots, out-lots, and common-field lots, in the State of Missouri, reserved for the support of schools in the respective towns and villages aforesaid, by the second section of the above-recited act of Congress, and that the same shall be sold or disposed of, or regulated for the said purposes, in such manner as may be directed by the legislature of said State.

Act of 13 June, 1812, 2 Stats. at Large, p. 748.
Act of 29 April, 1816, 3 Statutes, p. 328.
Act of 26 May, 1824, 4 ed., page 52.
Act of 27 January, 1831, 4 id., p. 435.

In the Supreme Court

OF THE UNITED STATES.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS,
Plaintiff in Error,

vs.

GOTTFRIED SCHOENTHALER'S REPRESENTATIVES.

ON WRIT OF ERROR, UNDER THE 25TH SECTION OF THE ACT OF 1789, TO THE SUPREME COURT OF MISSOURI.

BRIEF OF THOS. T. GANTT,

Of Counsel for Defendant in Error.

In Supreme Court of the United States.

December Term, 1868.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE SAINT LOUIS PUBLIC SCHOOLS, *Plaintiff in Error.*
vs.
GOTTFRIED SCHOENTHALER'S REPRESENTATIVES.

ON WRIT OF ERROR, UNDER THE 25TH SECTION OF THE ACT OF 1789, TO THE SUPREME COURT OF MISSOURI.

This was an action of ejectment commenced in the St. Louis Land Court, and removed on the application of the plaintiff to the St. Louis Circuit Court, where it was tried at the February term, 1864. There was a verdict for the defendant, on which judgment was given. A bill of exceptions was taken from which it appears that the plaintiff put in evidence the order of the St. Louis Court of Common Pleas, dated Nov. 9, 1809, incorporating the town of St. Louis; also the survey executed under the first section of the act of June 13, 1812, of the out boundary, including the town, common fields, and common of St. Louis; also, a survey made Dec. 10, 1855, of a tract of land assigned by the Surveyor General for Missouri to the Board, &c., of Public Schools, under the act of June 13, 1812, and the act supplementary thereto. The survey was numbered 400. The plaintiff then read in evidence an act of the General Assembly of Missouri, entitled "An act authorizing the settling of conflicting claims to certain real estate in the city of St, Louis," approved 23d November, 1857 (session acts, 1857, p. 488–9), and a deed from the city of St. Louis to the school corporation. The general acts of Congress of 1824 and 1831, supplementary to the act of 1812, and the act of the Missouri Legislature incorporating the Board &c. of the Missouri Public Schools, were also read by plaintiff, but are not incorporated into the record, being indeed public acts. This was all the testimony offered by the plaintiff. There was an admission that the defendants were

in the possession of the property at the commencement of the suit.

On part of the defense was read a concession or grant from Don Manuel Perez, Lieut. Governor, by which there was granted to Charles Levellier or "Lebelle, his heirs and assigns, in fee simple, a lot of ground of sixty feet front only, by one hundred and fifty feet deep, situated in this town of St. Louis, bounded on one side to the lot of Louis Ride's heirs, on the other by the King's domain, on the rear by the Mississippi river, and on its principal front by the road which leads from Second street to the Prairie a Catalan, under the condition," &c. This grant was dated 1st March, 1788.

The defendant then proved by the testimony of certain old men and women (the depositions of Man. Dabin and Jacques L'Abbé are, by a mistake of the clerk, omitted from the transcripts, but they are only a little older than, and entirely confirmatory of, Jean Porncelli and J. B. Hortiz), that prior to the change of government—indeed before 1800—Charles Levellier and his wife lived on the lot described in the concession; that there was on the south of it a road, which is now Hazel street; its western boundary was the road coming out of Second street and leading to Carondelet (Prairie a Catalan); its northern boundary was a lot belonging to Louis Ride's heirs, and the eastern boundary was the river Mississippi. At that time the distance from this road which ran by the front of this lot, to the Mississippi river, was not more than from 150 to 200 feet. Before the year 1800 there were on the lot many large fruit trees—apple, pear, and plum trees, in full bearing. The older witnesses had eaten fruit from there before the year 1800. The house was old at that time. The lot was inclosed by a fence which extended along the front on the road (Second street), and also along the south boundary to the river. At that time, the river ran deep where Main street now is, and considerably westward of it. The river bank was steep. Levellier's eastern fence was upon the top of the bank. There was no street or road to the east of Levellier's lot. Sometimes there was a path, but it was very difficult for a person, even on foot, to get along that path; when the water was high, he had to hold to the fence to avoid falling into the water.

Levellier and his wife lived on this lot together until 1809 or 1810, when the old man died. His widow survived until 1827. In 1826 she sold part of the lot to a man named Longtin. Schoenthaler subsequently acquired, by purchase, the northern half of the lot, and up to his death, which occurred in 1861–2, continued to occupy it. There was very high water in 1844. The river at that time changed its course, a great deposit took place from Plum street southward, and the river receded several hundred feet to the eastward. What was called "Duncan's Island" lay nearly opposite to this lot and a little south of it. The deep water was formerly to the west of Duncan's Island;

now, Duncan's Island is west of Front street. Main street, as now established, was laid out and opened in 1853–4. Between 1844 and 1853 there was a street of that name much westward, between Main street, as now established, and Second street. In Spanish times—that is, prior to 1804 and from that time to 1844—Main street did not run south below Plum street. If you had continued the street in those days below Plum street, you would have run into the river. [P. 28, printed record.] Plum street is the street south of Poplar; then comes (going south) Cedar street, then Mulberry, then Lombard, and then Hazel, which is the southern boundary of Levellier's lot. All these names, and the streets themselves for the most part, are modern. The western bank of the Mississippi river, from Plum street northward was rocky. There was no rock on the western bank south of Plum. There was no street in Spanish times where Hazel street now is, and there was no other cross street south of it. The continuation of Second street southward was the road to Prairie a Catalan (now Carondelet) that crossed over the bridge at Mill creek (the outlet to Chouteau's Pond). This bridge was the only place in those days where you could cross Mill creek at that quarter.

The plaintiff, in rebuttal, read the deposition of Wm. Boly, who testified that he was born in 1785; lived in St. Louis in Spanish times: that there were but few houses at that time in the south part of the city; that during Spanish times, Main street ran down to Baptiste Lebeau's, and below that there was a tow-path about 25 feet wide to Mill creek; that the boat hands used to walk along this path to warp up their boats. If the water was low, they walked under the bank; if high, they walked on the top of it. Did not know that any except the the boat hands used the path; supposed that others might have done so, if so inclined.

He also examined Chas. Sanguinette. This witness was 80 years old. He said there was a road running along the east front of Levellier's, between it and the river, not less than 15 or 16 feet wide, in Spanish times.

On cross-examination, he said that the road he referred to crossed the bridge at Mill creek; that Main street in those days came down further south than Levellier's lot, and ran into the river some distance below; that he thinks Main street ran to the east of Levellier's lot, at the time of the change of government.

The plaintiff then gave in evidence the following maps and papers:

1. Copy of Chouteau's plat of the old town of St. Louis, supposed to be made in 1764.

2. Plat of the town of St. Louis, compiled 12th March, 1846, by Surveyor General Conway.

3. A plat of the town of St. Louis, certified 14th April, 1859, by James Loughborough.

4. Plat of St. Louis township (45 N. R. 7 E.); also copies of plots of city blocks 43, 44, and 45, of the town of St. Louis. made in 1835.

Also a certified copy of a survey made in 1855 of a confirmation to Charles Levellier of 60x150 feet, numbered 394. This survey covered a front of 64 4-12 feet by a depth of 160 5-12 feet. (This shows that the surveyor simply measured 60 and 150 feet respectively, *French measure.*)

The plaintiff then gave in evidence a concession, confirmation and survey of land to Louis Ride, lying north of the lot of Levellier.

To the introduction of all these papers the defendants objected, that they were wholly irrelevant; but the court admitted them.

Plaintiff then read a copy of a deed from the widow of Levellier, dated 24th February, 1825, conveying to Pere Longtin a lot 30 feet in front on the Mississippi river by 120 feet in depth, running westwardly; "bounded on the east by a road separating it from the Mississippi, north by Francis Tayon, on the west south by land reserved to me, which land belongs to me as appears by a concession of a large quantity in Livre Terrein," and then read a list of lands certified by the recorder of land titles in St. Louis, as fronting on the tow-path. Defendant objected to this testimony also, having been constantly unable to perceive its relevancy to any issue in this cause. The court admitted it, however.

The defendant examined Adams and Dowling to contradict what had been said by Boly and Sanguinette. They proved that neither in 1805 nor for thirty-five years following did Main street continue below Plum. Below that point there was no street, but only a very narrow path, sometimes no broader than your hand.

Dowling, whose memory went back to 1817, testified to the same effect, and added, that at that time the inclosures end of Second street ran to the river, and the inhabitants claimed to the river.

This was all the testimony in the cause. The plaintiff asked the following instructions, which the court gave:

1. The eastern boundary line of the corporation of St. Louis, of 1809, and the eastern boundary line of the out-boundary of December 8th, 1840, read in evidence, both extend to the eastern boundary of the State of Missouri, which is the middle of the main channel of the Mississippi river.

2. The defendant in his case has set up no title in himself or those whom he represents, or under whom he claims, but seeks to maintain his possession as a mere intruder, by setting up title in a third person with whom he has no privity. In such a case, it is incumbent upon the party settling up the defense to establish the existence of such an outstanding title beyond all controversy. It is not sufficient for him to show that there

may be possibly such a title. If he leaves it in doubt, that is enough for the plaintiff. Where a plaintiff has a *prima facie* good title, he has a right to rely on such title, and is not bound to furnish any evidence to assist the defense. It is not incumbent on him negatively to establish the non-existence of such an outstanding title, but it is the duty of the defendant to make its existence certain.

The court gave the following instructions at the request of the defendant, plaintiff excepting:

1. The jury is instructed that if they believe from the evidence that prior to the 20th December, 1803, a person named Levellier inhabited, cultivated and possessed a lot of ground in the town of St. Louis, bounded west by Second street, on the east by the river Mississippi, on the south by a line parallel to Hazel street and near to it, and on the north by another parallel line sixty feet distant from the first parallel; that Levellier claimed the lot as his own; that he continued on the same lot until his death, which occurred before 1812; that the west or right bank of the river was then nearer to Second street than it now is; that the premises in controversy are included between Second street on the west, the Mississippi on the east, and the north and south lines of Levellier's possession extended to the bank of the river in its new position; then the plaintiff cannot recover, and the jury must find for the defendants.

2. The jury is further instructed that, if they find from the evidence that there was, for the convenience of those who occupied the lot of Leveiller, and the adjoining neighbors and others, a road left along the front of it, between it and the river, and that when the river receded the road was moved further east, and when the river rose it was extended farther west; and that the same was the case with the enclosure of Levellier; there is no presumption thence arising against the ownership by Levellier, and those claiming under him up to the middle of the main channel of the river, subject to the easement of the public to use the river as a highway, and to cordel the boats used in navigation it by means of the road above spoken of.

3. The jury is instructed that the concession to Leveillier read in evidence, dated 1st March, 1788, is evidence of the extent of his claim to the ground therein described, and evidence that he claimed to the Mississippi river.

4. The jury is further instructed that the first section of the act of 1812 confirmed the titles of the inhabitants of the town of St. Louis to lots inhabited, cultivated and possessed by them on the 20th December, 1803, according to their claims thereto.

5. The jury is further instructed that nothing done by any officer of the United States, subsequently to the 13th June, 1812, has any effect to limit or impair any right accruing to any individual under that act.

The plaintiff asked, and the court refused, the following instructions:

1. If the jury believe from the evidence that, in accordance with the plan of the town of St. Louis, as laid out in 1764, there was, between the front row of lots and the river, a space of ground left for a street, road, tow-path or levee, or dedicated to any other use common to the inhabitants thereof, or the public: then the said lots are not riparian and not entitled to alluvion.

2. The jury are instructed to disregard all parol evidence tending to establish a boundary of a lot varying from that of other lots in the same tier, if they are satisfied from all the evidence in the cause that such uniformity was a part of the plan of the Spanish town of St. Louis.

3. If the jury believe that block 44, to which the land in controversy is claimed as an accession through alluvion, was by the U. S. surveys in 1835, surrounded on all sides by streets, and said surveys have stood from that time to the present as the approved surveys of the town without appeal, the owners of the lots thus surveyed are estopped from claiming any ground beyond the street which is by such survey made its eastern boundary.

4. The call for the river on the eastern boundary of the lot of Levellier on the original concession of the Lieut. Governor, is not conclusive evidence that the lot is riparian, but if the jury believe from the maps and plans in evidence, and all the evidence in the cause, that the Spanish authorities intended to leave a space between the tier of lots, of which block 44 is one, and the river for continuation of Main and Front streets, or for any other public purposes, the call will be disregarded.

5. The jury are instructed, that as a question of law, the owners of lots in the town of St. Louis, as said town existed prior to December 20, 1803, have never had any riparian rights.

6. If the jury believe from the evidence that there was a street, or towpath, or passage way for the use of the public between the Missi-sippi river and the most eastern row of lots in the former town of St. Louis, as said town existed prior to December, 20, 1803, then, and in that case, the owners or claimants of said lots are not riparian proprietors of the lands between said lots and the said river.

7. If the jury believe from the evidence that prior to December 20, 1803, there was a road or passway between the front row of the lots in the former town of St. Louis and the Mississippi river; that the river, after that time washed away the land so that the western edge or bank thereof was west of said road or passway and west of the eastern boundary line of said lots, and that afterwards the river receded so that the present western edge or bank thereof is no further west than where it was prior to December 20, 1803, the owners of said lots are not entitled to riparian rights.

8. The jury will find for the plaintiff, if they believe from the evidence that all the maps, plats, surveys, deeds, and other documents and instruments read in evidence by the plaintiff are

genuine, and that the premises in controversy are within the boundaries of the corporation of 1809, and within the out-boundary of Dec. 8, 1840, read in evidence, and also within the school assignment, being survey 400, read in evidence, and that the land described in the deed from the city of St. Louis to the plaintiff read in evidence, includes the land that is described in the petition of the plaintiff, and also that the land described in said petition is not within the boundaries of any land cofirmed to any person or persons.

9. If both the confirmation and the surveys of the United States to private individuals for the most eastern row of lots west of the premises in controversy, do not call for the Mississippi river as a boundary, then the owners of said lots are not entitled to said premises as riparian proprietors.

10. If the jury believe from the evidence that the defendants claim under a confirmation, and that the survey of such confirmation does not call for the river as a boundary, they are estopped by said survey, and cannot claim any right as a riparian proprietor.

To the refusal of these instructions the plaintiff duly excepted. There was a verdict for the defendants. After motion for a new trial, the plaintiff appealed to the Supreme Court of the State; where, at the March term, 1867, the judgment in this case was affirmed. The plaintiff now brings the record to this court by writ of error, under the 25th section of the judiciary act: This case is reported, 40 Mo. Rep., p. 372.

When this cause was determined by the Supreme Court of the State of Missouri, that tribunal, after taking a rapid glance at the great mass of evidence which had been accumulated in this case, and that of the Schools v. Risley's heirs, remarked that, "The only important point in the whole case turns on the question as to whether the proprietors of the lots are entitled to riparian privileges. This question has been considered twice before in this court and once in the Supreme Court of the United States, and must be considered as settled, as *res adjudicata*, and no longer a subject for discussion.

"In the case of Jones v. Soulard, 24 How., U. S. S. C. Reps. p. 41, it is expressly decided that the calls for the eastern line of the boundary of St. Louis, in the incorporation of 1809, make the city a riparian proprietor upon the Mississippi, and as such entitled to all accretions as far as the middle thread of the stream. In Smith v. Public Schools, 30 Mo., 301, it is held that if the river is the boundary of a town lot, it may be riparian, just as much as a tract of land would be in the country. And the question is again examined, affirmed and approved in LeBeau v. Gaven, 37 Mo., 556. That the call and descriptions contained in the original concessions to Levellier, called for the bank of the Mississippi as the eastern boundary cannot be for a moment gainsaid or doubted.

"Whatever evidence there was bearing on the subject was

given to the jury under instructions of the most favorable character for the appellant." [The appellant in that case is the plaintiff in error here] Pp. 371, 372 of 40 Mo. Rep.

In the State Court the cases which are now brought before this tribunal were tried consecutively, and when the opinion of the court was given the points arising on the record of each being considered to be substantially the same, the court gave an extended opinion in the one case, and shortened the decision in the other by reference to that already pronounced. The Risley case was argued in the State court by Mr. Field, and the Schoenthaler case by the undersigned. In arguing both of them here, the difficulty is felt of saying anything which, after the compact and decisive summary by the State court, of the law on the subject under discussion, and its application to the facts shown by the record, will not wear the appearance of an anti-climax. It happened that the undersigned* was the counsel in the case of Jones v. Soulard decided by this court in January, 1861, and reported in 24 How. He then consulted every authority bearing upon the subject, and quoted largely from the leading cases and treatises from the time of Sir Matthew Hale to 1860. He certainly does not propose any repetition of this task at this time. It would be simply an impertinence to treat as a doubtful matter, capable of elucidation and illustration by anything he could originate or compile, a question of law the settlement of which has received the stamp of authority from the tribunal of last resort. If anything could make such a settlement still more unquestionable, and argument still more preposterous, it would be the fact that this case is brought up by writ of error to this high court for the purpose of reversing a judgment, the only fault imputable to which is its conformity with the law ascertained by the court now sitting as a court of appeals. This court is not accustomed to seek for its own opinions the aid of recognition by other tribunals, and seldom does it listen to a suggestion that it should overrule one of its own adjudications. But in the case at bar, whatever of superflous strength may be given by the concurrence of other administrators of the law, is furnished abundantly.

It is conceived to be unnecessary to dwell upon the very obvious truth, that the only question presented by the record, of which *this* court can take cognizance, is that which has already been adverted to. In the opinion of the State Court, it was "the only important question." But to that forum was committed the task of determining several other matters of exception, (all of which were decided for the defendant in error,) with the determination of which, no matter how, this court would hardly interfere. The jurisdiction of this court, in this case, depends on the fact that both parties claim title, under the act of 13th June, 1812. The plaintiff

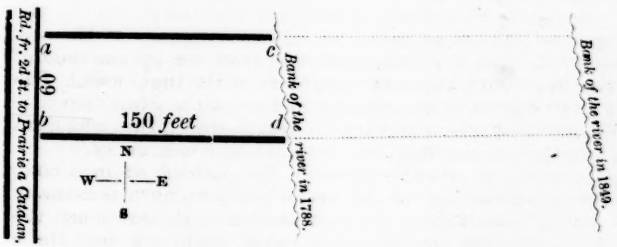
* He is, to be sure, in the report of the case, called *Garrett* (24 How. p. 48), but the record shows the word *Gantt* plainly enough.

in error claims under the ~~first~~ second section; the defendant in error under the ~~second~~. The first section confirms, *proprio vigore*, [Savignac v. Garrison, 18 How., 136; Guitard v. Stoddard, 16 How, 494,] "the rights, titles and claims to town or village lots, out-lots, common field lots, or commons in, adjoining or belonging to St. Louis, etc., which lots have been inhabited, cultivated or possessed prior to the 20th December, 1803;" and, by the same section, the deputy surveyor was directed to survey and mark the out-boundary line of the several towns and villages named, "so as to include the out-lots, common field lots and commons thereto respectively belonging." This survey was actually constructed, in the case of St. Louis, in 1840. [See 18 How., p. 23—Kissell v. The Schools.

The second section of the act of 13th June, 1812, reserves for the support of schools "all town or village lots, out-lots or common field lots included in such surveys, which are *not rightfully* owned or claimed by any private individuals," or "held as commons belonging" to the towns or villages named, or reserved for military purposes by the President of the United States.

It follows that the schools can have nothing in common, under this act, with any private claimant. If the private claimant has *any* right, the schools have *none*; and the schools have only a part of such lots as are "*not* rightfully owned or claimed by any private individual."

Laying down on paper the land granted by the Spanish government in 1788 to Charles Leballe, we remark that it must have a front of sixty feet by a depth of 150 feet, bounded on one side by the lot of Louis Ride's heirs, on the other by the King's domain, (public land,) on its rear by the Mississippi river, and on its principal front by the road leading from Second street to Prairie a Catalan (afterwards Carondelet.) The Mississippi is therefore the eastern boundary, and the continuation of Second street the western. In September, 1788, this land is called the northern boundary of land granted to Augustine Amiot. We proceed to contruct the plat:—



The diagram *a, b, c, d*, shows the land granted Levellier in 1788; and all the witnesses whose memories go back to the last

century, prove that he and his wife lived upon the lot, claiming it as their own for some time prior to the 20th December, 1803—the day on which the French commandant at New Orleans delivered possession of Louisiana to Governor Claiborne and General Wilkinson, commissioners for the United States, and the day, therefore, which divides the French from the American dominion.

The eastern boundary of Levellier's lot was, according to the grant, "the Mississippi river;" and the witnesses who speak of his possession, show that he occupied up to the water's edge. His grant and claim extended then "*usque ad medium flum aquæ*," and his actual occupation was commensurate with them, as far as the nature of things permitted. This claim was confirmed by the act of June 13, 1812; for he held, "inhabited, cultivated and possessed" the lot prior to 20th December, 1803, and his widow held it in 1812—continued, indeed, to hold it until 1827, when she died. The lot thus confirmed, going to the extreme eastern boundary of the city of St. Louis and the State of Missouri, it was impossible that the public schools of St. Louis should have any tenable pretensions to any land between the northern and southern lines of this lot, produced eastwardly from the site of the ancient bank of the Mississippi; for, as has just been shown, the whole of the land thus comprised was by the *first* section, confirmed to Lebelle or his legal representatives. As the plaintiff (the Board of Public Schools) must recover, if at all, on the strength of its own title, it was enough to demonstrate that *it* had no such title. The derivative title of defendant, under Levellier, would but have cumbered the record, adding not a jot to the proof of plaintiff's inability to recover.

When the Supreme Court of Missouri decided this case, it remarked that the evidence bearing upon the question of possession prior to 20th December, 1803, "was given to the jury under instructions of *the most favorable character* for the appellant," (the schools.) and a very cursory examination of the instructions will fully verify the pointed observation.

The first instruction given to the jury was asked for by the plaintiff. It told them that the eastern boundary of the corporation of St. Louis, as established in 1809, was the middle of the Mississippi river—and of this there can be no doubt. The second told them that the plaintiff had shown a *prima facie* title to the land sued for, and that, to overthrow it, the defendant must show an "outstanding title beyond all controversy."

Now, as the evidence showed that the plaintiff claimed land, under the second section of the act of 1815, which was actually confirmed to Levellier by the first section of the same act, the *nisi prius* court went to the very verge of propriety, perhaps a little beyond it, in using language like this. The error, however, was committed at the instance and in the interest of the plaintiff below, now plaintiff in error. And, though the defend-

ant below, and defendant in error here, might reasonably complain of it, the mouth of the plaintiff in error is sealed.

On the part of the defendants below, defendants in error here, the court instructed the jury if, prior to and on the 20th December, 1803, Levellier inhabited, cultivated and possessed a lot of ground in the town of St. Louis, bounded west by Second street, east by the Mississippi river, north and south by lines parallel to Hazel street, and sixty feet apart, that Levellier claimed this lot as his own, that he occupied it until his death, which occurred before 1812, but that his widow continued to occupy it after 1812, that the river was then nearer to Second street than it now is, and that the premises in controversy are included between Second street on the west, the Mississippi on the east, and the north and south lines of Levellier's possession extended to the river in its new position, then the plaintiff cannot recover.

This is plain law. The first section of the act of 13th June, 1812, confirms all such lots, *proprio vigore*, to the occupant and claimant. [Guitard v. Stoddard, 16 How., 494.] The previous cases are collected by Mr. Geyer, at p. 500, and fully confirmed by this decision of this court. This was in 1853. The matter has never since been drawn into serious question. That the lot so bounded extended to the middle of the main channel of the stream, and so left nothing for any other Missouri claimant between its northern and southern lines, has already been abundantly shown.

The second instruction asked by the defendants was, in truth, a most unnecessary concession to the pretence that there was a road along the river front of the lot, there being no evidence that there was even a path, (sentier,) far less a road, (chemin,) to the east of the lot of Levellier. But the existence of such a *road*, even, is no bar to riparian rights. This was decided in 30 Mo. Rep., p 290—Smith v. The Schools, recognizing the authority of 18 Louisiana, p. 236 [6 Martin, Louisiana Rep.] Indeed, this rule is quite consistent with what is said by Sir Matthew Hale. All riparian proprietors are subject to this limitation of their rights. If the stream to which these lands are adjacent be navigable, "whether they be fresh or salt, whether they flow and reflow or not, they are, *prima facie publici juris*," "not in respect to the propriety (proprietorship) of the river, but to the public use." [Chap. ii. of Hale's Treatise.] The public has a right to float boats or vessels on the waters of such streams. This is an easement, and its exercise is no trespass against the proprietor of the adjacent land. The use of the shore for ~~working~~ warping up the boats against the stream seems equally consistent with the rights of the riparian owner. Otherwise, where could the line be drawn? In Angell on watercourses, § 551, it is intimated that, on this head, there was a difference between the rule of the common and civil law. We are not concerned with that; for it is on all hands admitted that the rule of the

civil law was that this right to use the shore co-existed with the right of riparian ownership. [*Id. ibid.*] And this very point arose upwards of thirty years ago, and was decided, as now claimed by defendants in error, in the case of O'Fallon v. Daggett and Price. [4 Mo., 343.] It will be remembered, of course, that the common law was first introduced into Missouri in 1816.

The third instruction asked by the defendants and given by the court told the jury that the concession to Levellier, read in evidence, dated 1st March, 1788, was evidence of the extent of his claim to the lot therein described, and evidence that he claimed to the Mississippi river.

This is so plain that it is of the nature of a truism. The *concession* was the only title paper which Levellier had. The lot described in it was the ground he claimed under it. His claim was according to the tenor of the concession, and the terms of the concession carried the claimant to the middle of the main channel of the Mississippi river.

The fourth instruction told the jury that the inhabitants of St. Louis were confirmed in their claims to lots inhabited, cultivated and possessed by them on the 20th December, 1803, according to their claims thereto.

This simply stated to the jury the terms of the act of June 13th, 1812, as expounded by the courts of Missouri, and of the United States. [See Guitard v. Stoddard, Ubi Supra, and the cases there cited.]

The fifth instruction told the jury that nothing done by any official of the United States subsequently to 13th June, 1812, could be operative to limit or impair any right accruing to any individual under that act.

The reason why this instruction was asked is very apparent. The plaintiff had given in evidence against the protest of defendants, survey No. 394, made September 14th, 1855, by the surveyor-general for Missouri and Illinois [pp. 60, 61, 62, 63 and 64 of the record—pp. 28 and 29 of the printed record,] expressly declared to be "60 by 150 feet, French measure" [p. 60 of original, and 28 of printed record.] By reference to the date of the assignment for the schools, [p. 10 printed record,] we see that it bears date December 10, 1855. We can easily see by what inspiration the survey No. 394 was made. The piece of land lay temptingly before the school agent, bounded [see the diagram already exhibited] by the continuation of Second street on the West, by the Mississippi river on the east, and north and south by lines parallel to Hazel street, and sixty feet, French measure, asunder. But, in 1788, the distance from the road to the river was only supposed to be 150 feet. It is true, the call was for the river, and every tyro knows that to the river, were it 1500 instead of only 150 feet, the line must be extended. The witnesses tell us that there was in the beginning of the century only a space of 200 feet or thereabouts

between Second street and the river [testimony of Barada, p. 19, printed record.] Adams tells us [p. 21] that, in his infancy, which was about the beginning of the century, "the river was further west than where Main street now is. A deep channel used to be where Main street now is." But the idea seems to have been entertained by the school agent that this well established rule of surveying—of geometry and common sense—could be overthrown on this occasion, and a large acquisition of valuable land made by reason of its subversion. The surveyor-general appears to have been persuaded, *in the interests of the schools*, to make what he is pleased to call a survey of Levellier's lot. He causes course and distance to control metes and bounds. He measures from Second street 150 feet, French measure, which are equal to 160 feet 5 inches, English measure; and, though he has not reached the river, or even a road or street, he stops, and, thus limiting the land confirmed to Levellier, he extends the north and south lines of his grant onward to the river, *and assigns to the schools all that lies eastward of a line parallel with Second street, and* 160 5-12 *feet distant from it.*

I said that the survey 394 was made *in the interests of the schools.* Most clearly Levellier and his representatives did not ask for it. Most clearly they did not need a survey at all; for it had been decided in Guitard v. Stoddard, already quoted, that nothing remained to be done by any official to perfect the title of those whose claims were confirmed by the first section of the act of 1812. Applying the test, "*Cui bono fuerit?*" the answer is that, as the schools were interested in having Levellier's lot thus limited; as they were benefited by this violation, nay, this inversion of a rule with which every surveyor, and almost every school-boy, is familiar; and as Levellier's representives, if affected at all, would be injured by it; as they are not shown to have asked for, or even to have been acquainted with this monstrous piece of official delinquency or gross ignorance, we are fully justified in supposing that both of these surveys—both 394 and 400—were *procured* by the agent of the schools.

The use made of this survey at the trial was a little startling. It was gravely contended that the defendants were *estopped* to claim any land outside of it! [See the tenth instruction asked for by the plaintiff, and refused, p. 40 of printed record.] The defendants were of opinion that the survey should not have been given in evidence to the jury *at all.* The court overruled their objections: and, as they won the case, they did not preserve the exception; but they extracted, as far as possible, the *virus* of such improper evidence by instruction No. 5. The court gave this instruction thus substantially, after admitting this survey, instructing the jury to disregard it.

Of course, the distinction between confirmations under the act of 1812, which, as declared in Guitard v. Stoddard, need no survey, and confirmations under the act of 1807, which, by the

terms of the confirmation, are directed to be surveyed—*i. e.*, to have their boundaries and locality designated by a United States officer, as was the case in West v. Cochran, 17 How., 403—is too obvious to need any comment.

The instructions given by the court, at the instance of both parties, are therefore free from all exceptions.

Coming now to the instructions asked by the plaintiff, and refused by the court, the defendants need hardly, in a formal manner, remark that, if the instructions *given* contained a correct exposition of the law, no case would be made for a reversal by merely showing that some one of the refused instructions also was declaratory of a correct principle. It must appear besides, that, for want of the instruction refused, the jury was either certainly or possibly misled to the injury of the plaintiff in error. But defendants confidently submit that not one of the refused instructions was, in itself, tenable.

The first is, that if in the plan of the town of St. Louis, as laid out in 1764, there was, between the front row of lots and the river, a space of ground left for a street, road, tow-path, or levee, or dedicated to any other use common to the inhabitants of the town, then said lots are not riparian.

The first objection to this instruction is, that there is not a jot of evidence on which to base it. There is nothing to show that any person having authority on the subject ever made a plan of St. Louis at all. It is true, a copy of an old map called "Chouteau's plat of the old town of St. Louis," was offered in evidence. [I see no mention of it in the record.] But when this map was made, or by whom, does not appear. It is wholly without authentication. If made by Chouteau, then it is clear that he was not the owner of the land it embraced. He was not an officer of the Spanish crown, and possessed no power of dedicating any part of it. All that men of modern days know of this map is, that it contradicts all witnesses whose memories take them back to the last century. It clearly had not the sanction of the Spanish authorities. The grant to Levellier of 1st March, 1788, running from the east line of Second street to the river, not only ignores, but repudiates any such limitations as the instruction assumes. To attribute to this map the least authority, is, according to all accessible evidence, to do it infinitely too much honor. It is not recognized by any official. It was not the act of any proprietor. There is nothing in the history of the country, or in its traditions, to give it the smallest importance. There is much in both to discredit it entirely. This instruction, then, was properly refused, as being unwarranted by the evidence.

It has already been shown, when considering the second instruction given at the instance of the defendants in error, that the existence of a tow-path in front of a piece of ground is not inconsistent with the riparian rights of the proprietor. I will not go over that argument again.

The second instruction asked by the plaintiff, and refused by the court, told the jury "to disregard all parol evidence tending to establish the boundary of a lot varying from that of other lots in the same tier, if they were satisfied from all the evidence in the cause, that such uniformity was part of the plan of the Spanish town of St. Louis."

The objections to this instruction are manifold. There was no evidence of the lot in question belonging to any tier; there was not even a suggestion of uniformity by any part of the evidence; and there was nothing beyond the merest fancy sketch of a "Plan of the Spanish Town of St. Louis." It has already been shown that this creature of the imagination had no real existence. Where the proprietor of a tract of land subdivides it into blocks and lots, and bounds them by a definite line, numbers the lots, and sells them, according to the plat, by their numbers, referring to the plat for greater certainty of description, there is room for applying the rule aimed at in the second instruction, as was done in a case to be found in the Ohio reports.

Here there is no such room.

The third refused instruction tells the jury that, if they believe from the evidence that block 44, to which the land in controversy is claimed as an accretion through alluvion, was, by the United States surveyor in 1835, bounded on all sides by streets ~~in 1835~~, and said surveys have since then stood unchallenged, then the owners of the land thus surveyed are estopped from claiming any land beyond the streets which, by such survey, were made their eastern boundary,

This instruction presents a curious jumble of false assumption, and bad reasoning from the fact assumed. In the first place, the lot in controversy was not claimed as an accretion and accession by alluvion to block 44. It was claimed as an accretion by alluvion to the lot granted to Levellier in 1788, and by him and his wife continually occupied from 1788 to 1826. In the second place, it has been decided, over and over again, that nothing done in the way of survey, or even subsequent legislation by the United States authorities, can divert a title given by the act of 1812. In the third place, it would be difficult to answer the question, "Where did the United States surveyor find any warrant for surveying *city* blocks at all, and notably block 44?" The truth is, that no such survey was made by way of defining the limits of the municipal subdivisions of the city, but merely in order to ascertain the intersections and interferences of lines and figures fixed by municipal authority with lines and figures fixed by the authority of the United States—but it is useless to argue so plain a matter.

The fourth instruction refused told the jury that "the call for the river as the eastern boundary of Levellier's lot was not conclusive;" but that, if they believed "from the maps and plans in evidence, and all the evidence in the case, that the Spanish

authorities intended to leave a space between the tier of lots of which block 44 was one, and the river, the continuation of Main street, or Front street, or for any other public purpose, said call must be disregarded."

Inasmuch as "block 44" had no existence in "Spanish times;" as there was no evidence of any "tier of lots" contemplated by the Spanish authoritses, and no evidence of any purpose on the part of the functionaries of Spain to reserve for public use any part of the land granted to Levellier, and by him constantly occupied, there does not seem to be even a color of *fact* upon which to rest the comparison suggested by the instruction between a supposition which no one can prove and a fact which carries its proof on its face.

Of the fifth instruction refused it is enough to say that it was a bold attempt to ignore the custom of the country and to disregard the law settled for years both by the State and Federal judiciary.

I will not detain the court by stopping to justify the refusal of the 6th instruction. This is wholly unnecessary to do this. As to the 7th, it need only be said that it well exemplifies the random policy of the plaintiff. This instruction must have been asked without the least reflection, for the plaintiff could not have been ignorant that defendants had put in evidence no survey of their confirmation, and that it needed no survey.

As to the 8th instruction refused, it could only have been given if the Supreme Court had assumed to overrule the cause of Smith v. Schools, 30 Mo., 290. The merits of the 9th instruction have been discussed already when speaking of the 2d, and the 10th may be considered as covered by what was said in relation to the 1st, refused, and to the 2d, given at the instance of defendant.

I have thus gone, at great length, over the whole record. Had I consulted my own ideas of what was sufficient, I should have been far more brief. But in fact I have found it difficult to understand how this writ of error came to be prosecuted at all. The decision of the State court is so carefully conformed to the decisions of this tribunal—there is such a series of authorities to be cited in support of every proposition decided by the Supreme Court of Missouri—that I have felt absolutely unsettled by the failure to discover any point on which its judgment can be assailed. In this embarrassment, I felt it my duty to go over the whole ground, laboriously, and of course, tediously. Having performed this task, nothing can excuse any delay in bringing my remarks to a close.

THOS. T. GANTT,
of Counsel for Defendant in Error.